IN THE BOX: VOIR DIRE ON LGBT ISSUES IN CHANGING TIMES

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This is the first law review article to examine transcripts, court filings, and published opinions about jury voir dire on attitudes toward same-sex sexuality and LGBT issues. It demonstrates that jurors express a range of homonegative attitudes. Many jurors voicing such beliefs are not removed for cause, even in cases involving lesbian and gay people and issues. It suggests some best practices for voir dire to uncover attitudes toward same-sex sexuality, based on social science research. Voir dire on LGBT issues is likely to become more important in coming years. Despite enormous gains, including historic marriage equality decisions,[1] *the LGBT rights movement remains a cultural flashpoint. In part due to the work of LGBT advocates, more cases involving LGBT issues and sexuality are likely to enter the criminal legal system. These could involve alleged harassment or bullying, like the Dharun Ravi case, or hate crimes against LGBT people, which may be on the rise even as LGBT rights advance.*[2] *As stigma lessens and*

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[1] *See* United States v. Windsor, 133 S. Ct. 2675, 2696 (2013); Hollingsworth v. Perry, 133 S. Ct. 2652, 2659, 2668 (2013).

[2] *See* John Leland, *'It Was Like I Was by Myself:' Gay People in Bronx Seek a Place to Be Themselves*, N.Y. TIMES (July 26, 2013), http://www.nytimes.com/2013/07/28/nyregion/gay-people-in-bronx-seek-a-place-to-be-themselves.html, *archived at* http://perma.cc/B9KR-L36P (discussing the reopening of the Bronx gay and lesbian center and reporting that "[t]he police recorded seven bias crimes against gay people in the Bronx this year [2013] through July 14, up from one such crime in 2012 in the same period. Citywide, the number of attacks recorded during that period rose to 59 from 28."); Vijai Singh, *A Killing in Greenwich Village: As Gay Rights Increase, So Do Hate Crimes*, N.Y. TIMES (May 21, 2013), http://www.nytimes.com/video/nyregion/100000002236382/a-murder-in-greenwich-village.html, *archived at* http://perma.cc/7ZBL-CNE8 (conducting a video interview of Sharon Stapel of the N.Y.C. Anti-Violence Project, who describes a rise in anti-gay attacks in N.Y.C. over the past few years as a part of a "backlash" against

more complainants come forward, there also may be more claims of same-sex sexual assault or intimate partner violence. In many of these cases, defense attorneys or prosecutors will seek to voir dire jurors regarding their attitudes toward LGBT people and sexuality. At the same time, LGBT venirepersons may fear discrimination in voir dire. In 1998, Paul Lynd wrote that prospective jurors who revealed that they were gay faced employment discrimination or even criminal prosecution under then-extant sodomy laws.[3] *Today,* Lawrence v. Texas *has largely eliminated criminal stigma,*[4] *and some jurisdictions have LGBT anti-discrimination protections. Nonetheless, depending on the jurisdiction and the context, prospective gay jurors might still fear public "outing," and only a few jurisdictions protect jurors from peremptory strikes based on sexual orientation. This paper examines the complex and varying situations in which LGBT issues may surface in voir dire and offers suggestions for navigating this contested terrain.*

Introduction

From late February through early March 2012, Dharun Ravi was tried in Middlesex County, New Jersey on charges including invasion of privacy and bias intimidation.[5] As has been widely publicized, the state alleged that Ravi used a computer webcam to view his Rutgers roommate Tyler Cle-

gay rights); *see also* Joey L. Mogul et al., Queer (In)Justice: The Criminalization of LGBT People in the United States 126 (2011) (describing the spike in anti-gay violence in California during the Yes on Proposition 8 campaign).

[3] Paul R. Lynd, Comment, *Juror Sexual Orientation: The Fair Cross-Section Requirement, Privacy, Challenges for Cause & Peremptories*, 46 UCLA L. Rev. 231, 269 (1998).

[4] 539 U.S. 558, 578–79 (2003).

[5] *See* Richard Pérez-Peña, *Rutgers Dorm Spying Trial Begins with Questions of Motivation*, N.Y. Times (Feb. 24, 2012), http://www.nytimes.com/2012/02/25/nyregion/in-tyler-clementi-trial-looking-at-dharun-ravis-intentions.html, *archived* http://perma.cc/H4XD-6EP4; Kate Zernike, *Jury Finds Spying in Rutgers Dorm Was a Hate Crime*, N.Y. Times (Mar. 16, 2012), http://www.nytimes.com/2012/03/17/nyregion/defendant-guilty-

menti's encounter with another man, and then posted on Twitter, encouraging others to spy on Clementi and his date.[6] Tragically, Clementi committed suicide in the aftermath of the incident.[7] In an effort to empanel a fair jury, Middlesex County prosecutors and Ravi's defense attorney agreed on questions to ask prospective jurors, including queries designed to uncover homophobia.[8] One question was, "Do you have any particular views on lesbian, gay, homosexual, and/or bisexual issues (e.g. Don't Ask Don't Tell, gay marriage, etc.)? If yes, please explain."[9] In May 2012, a couple of months after Ravi's trial ended in a conviction,[10] President Barack Obama—who had long stated that his own views on same-sex marriage were "evolving"—announced his support for marriage equality for the first time.[11] Thus, the *Ravi* case, viewed by many as a cutting-edge prosecution designed to end bullying of LGBT youth,[12] also was notable because its voir dire of prospective jurors essentially tracked ongoing national debates about LGBT issues. This Article examines the complexities of questioning prospective jurors about their views on LGBT issues in a time of rapid social change,[13] and makes suggestions for best practices based on social science research.

In the coming years, LGBT people and relationships likely will continue to become more visible in courts across the nation.[14] Bias prosecutions like the *Ravi* case will reoccur, as will (sadly) cases involving even more serious anti-LGBT hate crimes,[15] such as the 2011 prosecution of Ventura

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in-rutgers-case.html, *archived at* http://perma.cc/6V29-GM83 [hereinafter Zernike, *Spying in Rutgers Dorm Was a Hate Crime*].

[6] Pérez-Peña, *supra* note 5.

[7] Lisa W. Foderaro, *Private Moment Made Public, Then a Fatal Jump*, N.Y. TIMES (Sept. 29, 2010), http://www.nytimes.com/2010/09/30/nyregion/30suicide.html, *archived at* http://perma.cc/4UV2-DBLM.

[8] Telephone Interview with Julia McClure and Christopher Schellhorn, Assistant Prosecutors, Middlesex County Prosecutor's Office (Sept. 11, 2012); Telephone Interview with Steven D. Altman, Attorney, Benedict & Altman, (Sept. 11, 2012).

[9] Email from Christopher Schellhorn, Assistant Prosecutor, Middlesex County Prosecutor's Office, to author (Sept. 11, 2012, 12:29 PM EST) (on file with author).

[10] Zernike, *Spying in Rutgers Dorm Was a Hate Crime*, *supra* note 5.

[11] Jackie Calmes & Peter Baker, *Obama Says Same-Sex Marriage Should Be Legal*, N.Y. TIMES (May 9, 2012), http://www.nytimes.com/2012/05/10/us/politics/obama-says-same-sex-marriage-should-be-legal.html, *archived at* http://perma.cc/FB22-XLCP.

[12] Zernike, *Spying in Rutgers Dorm Was a Hate Crime*, *supra* note 5 (quoting Steven Goldstein, chairman of Garden State Equality, as saying, "This verdict sends the important message that a 'kids will be kids' defense is no excuse to bully another student.").

[13] *Cf.* Anthony Michael Kreis, Lawrence *Meets Libel: Squaring Constitutional Norms with Sexual-Orientation Defamation*, 122 YALE L.J. ONLINE 125, 125, 133, 140 (2012), *archived at* http://perma.cc/J8WV-TUDP (describing "staggering inconsistency in courts' treatment of sexual-orientation defamation claims," as well as the "anachronistic" application of sexual-orientation defamation claims "[i]n an age when civil equality for LGBT people is rapidly accelerating").

[14] *See* Giovanna Shay & J. Kelly Strader, Queer (In)Justice*: Mapping New Gay (Scholarly) Agendas*, 102 J. CRIM. L. & CRIMINOLOGY 171, 172 (2012) (reviewing MOGUL ET AL., *supra* note 2).

[15] *See* MOGUL ET AL., *supra* note 2, at 126; *see also* Marc Santora & Joseph Goldstein, *In Shadow of the Stonewall Inn, a Gay Man is Killed*, N.Y. TIMES (May 18, 2013), http://www.nytimes.com/2013/05/19/nyregion/killing-in-greenwich-village-looks-like-

County, California teen Brendan McInerney for the shooting of his junior high classmate, Lawrence King.[16] As awareness of intimate partner violence in LGBT relationships increases,[17] more domestic violence cases involving same-sex couples will enter the courts. Reduced stigma associated with same-sex sexual contact may result in greater numbers of male rape survivors coming forward with complaints.[18] In all of these situations—and more—prosecutors and defense attorneys will seek to ensure a fair jury by asking voir dire questions about LGBT issues and sexuality.[19]

While LGBT people may figure as criminal defendants and victims in these cases,[20] they also appear as prospective jurors. In 1998, Paul Lynd warned that voir dire—even the routine variety that asks about friends and family—could risk "outing" some gay jurors, who at that time had good reason to fear discrimination.[21] Today, the U.S. Supreme Court has invalidated a portion of the Defense of Marriage Act of 1996 (DOMA),[22] and seventeen states and the District of Columbia recognize same-sex marriage.[23]

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hate-crime-police-say.html, *archived at* http://perma.cc/NUR8-MEAS; Adam Sege & Rex W. Huppke, *Hate Crime Draws Attention to Violence Against Lesbians, Gays*, CHI. TRIB. (July 12, 2013), http://articles.chicagotribune.com/2013-07-12/news/ct-met-hate-crime-charge-20130712_1_hate-crime-second-man-23-year-old-woman, *archived at* http://perma.cc/67RY-HJSF.

[16] David Alan Perkiss, *A New Strategy for Neutralizing the Gay Panic Defense at Trial: Lessons from the Lawrence King Case*, 60 UCLA L. REV. 778, 782, 788–89 (2013).

[17] *See* NAT'L COAL. OF ANTI-VIOLENCE PROGRAMS, LESBIAN, GAY, BISEXUAL, TRANSGENDER, QUEER AND HIV-AFFECTED INTIMATE PARTNER VIOLENCE (2010), *archived at* http://perma.cc/RPH2-7QRL; *see also* Krisana M. Hodges, *Trouble in Paradise: Barriers to Addressing Domestic Violence in Lesbian Relationships*, 9 LAW & SEXUALITY 311, 311–13 (2000); Adele M. Morrison, *Queering Domestic Violence to "Straighten Out" Criminal Law: What Might Happen When Queer Theory and Practice Meet Criminal Law's Conventional Response to Domestic Violence*, 13 S. CAL. REV. L. & WOMEN'S STUD. 81, 82 (2003); Tara R. Pfeifer, *Out of the Shadows: The Positive Impact of* Lawrence v. Texas *on Victims of Same-Sex Domestic Violence*, 109 PENN ST. L. REV. 1251, 1252–53, 1257–64 (2005); Giovanna Shay, *[Including but Not Limited to] Violence Against Women*, 42 SW. L. REV. 801, 801–05 (2013).

[18] *See* Bennett Capers, *Real Rape Too*, 99 CALIF. L. REV. 1259, 1276 (2011).

[19] *See* Todd Brower, *Twelve Angry—and Sometimes Alienated—Men: The Experiences and Treatment of Lesbians and Gay Men During Jury Service*, 59 DRAKE L. REV. 669, 690, 699–700 (2011) [hereinafter Brower, *Treatment of Lesbians and Gay Men in Jury Service*] (arguing that as acceptance of LGBT sexuality grows, LGBT persons increasingly might seek access to courts "to resolve disputes and enforce rights" and that, as these cases enter the courts, "[j]ury administrators, judges, and courts will increasingly have to grapple with sexual minorities and the issues they raise").

[20] *See generally* Abbe Smith, *The Complex Uses of Sexual Orientation in Criminal Court*, 11 AM. U. J. GENDER SOC. POL'Y & L. 101, 103 (2002) (describing the various tactical uses of sexual orientation in criminal litigation and positing that sympathy for LGBT victims in high-profile cases like the Matthew Shepard case "does not necessarily translate into any sort of sympathy or identification with the gay accused," including poor LGBT people of color accused of offenses like prostitution or solicitation).

[21] Lynd, *supra* note 3, at 268–69.

[22] United States v. Windsor, 133 S. Ct. 2675, 2696 (2013).

[23] *See* Masuma Ahuja et al., *The Changing Landscape on Same-Sex Marriage*, WASH. POST POLITICS (Feb. 27, 2014), http://www.washingtonpost.com/wp-srv/special/politics/same-sex-marriage, *archived at* http://perma.cc/7MWQ-J959 (listing California, Con-

Even some courts in solidly "red" states have ruled for marriage equality.[24] More states have passed anti-discrimination provisions since 1998,[25] and public attitudes have made a profound shift on LGBT issues.[26] These developments lessen the fear of discrimination, and it is likely that the mention of same-sex relationships in voir dire will become increasingly normalized.[27] However, in some jurisdictions and contexts, LGBT venirepersons still have reason for concern.[28] And in the vast majority of jurisdictions, there are no

necticut, Delaware, Hawaii, Illinois, Iowa, Maine, Maryland, Massachusetts, Minnesota, New Hampshire, New Jersey, New Mexico, New York, Rhode Island, Vermont, Washington, and the District of Columbia); *see also Illinois: Same-Sex Marriage is Legalized*, N.Y. TIMES (Nov. 20, 2013), http://www.nytimes.com/2013/11/21/us/illinois-same-sex-marriage-is-legalized.html, *archived at* http://perma.cc/N4P9-KUV5; Erik Eckholm, *Gay Marriage Battle Nears End in Hawaii, the First Front Line*, N.Y. TIMES (Nov. 8, 2013), http://www.nytimes.com/2013/11/09/us/gay-marriage-battle-nears-end-in-hawaii-the-first-front-line.html, *archived at* http://perma.cc/WE9K-KJP8; Jeremy W. Peters, *Federal Court Speaks, but Couples Still Face State Legal Patchwork*, N.Y. TIMES (June 26, 2013), http://www.nytimes.com/2013/06/27/us/politics/federal-court-speaks-but-couples-still-face-state-legal-patchwork.html, *archived at* http://perma.cc/V4B6-Z8ZM; Kate Zernike, *Same-Sex Marriages in New Jersey Can Begin, Court Rules*, N.Y. TIMES (Oct. 18, 2013), http://www.nytimes.com/2013/10/19/nyregion/same-sex-marriages-in-new-jersey-can-begin-court-rules.html, *archived at* http://perma.cc/8A8Q.

[24] *See, e.g.*, Bostic v. Rainey, No. 2:13cv395, 2014 WL 561978, at *23 (E.D. Va. Feb. 13, 2014) (invalidating Virginia's ban on same-sex marriage on equal protection and due process grounds); Bourke v. Beshear, No. 3:13-CV-750-H, 2014 WL 556729, at *8 (W.D. Ky. Feb. 12, 2014) (finding Kentucky's failure to recognize same-sex marriages violated equal protection); Kitchen v. Herbert, No. 2:13-cv-217, 2013 WL 6697874 (D. Utah Dec. 10, 2013), *stay granted pending appeal*, 134 S. Ct. 893 (2014) (mem.); Bishop v. United States *ex rel.* Holder, No. 04-CV-848-TCK-TLW, 2014 WL 116013, at *1 (N.D. Okla. Jan. 14, 2014); De Leon v. Perry, No. SA-13-CA-00982-OLG, 2014 WL 715741, at *27 (W.D. Tex. Feb. 26, 2014); DeBoer v. Snyder, No. 12-CV-10285, 2014 WL 1100794, at *10, *17 (E.D. Mich. Mar. 21, 2014); Timothy Williams, *New Virginia Attorney General Drops Defense of Marriage Ban*, N.Y. TIMES (Jan. 23, 2014), http://cached.newslookup.com/cached.php?ref_id=51&siteid=2041&id=4543553&t=1390505451, *archived at* http://perma.cc/HJ39-TGHN.

[25] *See* HUMAN RIGHTS CAMPAIGN, STATEWIDE EMPLOYMENT LAWS AND POLICIES (2014), *archived at* http://perma.cc/V2NF-275W.

[26] *See* Adam Nagourney, *Court Follows Nation's Lead*, N.Y. TIMES (June 26, 2013), http://www.nytimes.com/2013/06/27/us/politics/with-gay-marriage-a-tide-of-public-opinion-that-swept-past-the-court.html, *archived at* http://perma.cc/LW7S-BEGZ (saying that at the time of the Court's historic decisions in *Windsor* and *Hollingsworth* "much of the country had moved beyond the court"); *see also* Press Release, Williams Inst., Every State Showing Gains in Public Support for Same-Sex Marriage (Apr. 5, 2013), *archived at* http://perma.cc/RA5N-G23C.

[27] *Cf.* Perkiss, *supra* note 16, at 813–15 (recognizing that a jury might include people with "competing moral views of homosexuality," and that society has an "increasingly positive view of homosexuality"; also arguing that, while views of homosexuality are not uniformly positive, it is more likely today that gay jurors will be open about their sexual orientation and that there will be more jurors who possess "sympathy for victims of crimes motivated by homophobia").

[28] *Cf.* Tara Siegel Bernard, *Fired for Being Gay? Protections Are Piecemeal*, N.Y. TIMES (May 31, 2013), http://www.nytimes.com/2013/06/01/your-money/protections-for-gays-in-workplace-are-piecemeal.html?pagewanted=all, *archived at* http://perma.cc/5DZG-8PN9 (describing uneven state-by-state anti-discrimination protections for LGBT employees in the absence of a federal anti-discrimination statute).

legal prohibitions against striking jurors based on sexual orientation.[29] Since LGBT identity is often not readily apparent, questions that focus on LGBT issues might sometimes produce the unintended effect of "outing" some gay and transgender jurors.[30]

This Article examines recent cases in which criminal justice actors have confronted these complex issues. The paper is in three parts. Part I focuses on voir dire questions regarding LGBT attitudes and same-sex sexuality, and describes questions that attorneys have used in recent cases. Part II grapples with the challenges of voir dire on such contested cultural terrain.[31] Building on the work of Cynthia Lee,[32] I make suggestions for best practices in this area based on social science research. While few jurors will broadcast racial prejudice, prospective jurors express a variety of negative attitudes toward same-sex sexuality,[33] ranging from moral disapproval to outright animus. Because potential jurors commonly state that their moral disapproval of same-sex sexuality is based on religious beliefs, collisions between different rights could arise during voir dire in this area. I argue that, while strikes based on religious affiliation may be constitutionally suspect,[34] courts should excuse (and litigants may strike) jurors who express hostility to same-sex sexuality, even if their views are ostensibly rooted in religious beliefs. Part III addresses issues that can arise in voir dire for LGBT prospective jurors, who could be "outed" as a result of voir dire on LGBT issues, as well as

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[29] Andy Birkey, *Discrimination Against LGBT Jurors Remains Legal*, HUFFINGTON POST (May 1, 2012), http://www.huffingtonpost.com/2012/05/01/lgbt-discrimination-jurors_n_1466364.html, *archived at* http://perma.cc/X3MZ-HF39.

[30] *See* Brower, *Treatment of Lesbians and Gay Men in Jury Service*, *supra* note 19, at 680–88 (stating that LGBT jurors report sometimes feeling forced to "come out" in voir dire).

[31] *See* Cynthia Lee, *The Gay Panic Defense*, 42 U.C. DAVIS L. REV. 471, 566 (2008) [hereinafter Lee, *The Gay Panic Defense*] (explaining that "[c]ontroversies over the status of homosexuality are today the site of intense cultural dispute") (quoting Robert Post, *Law and Cultural Conflict*, 78 CHI.-KENT L. REV. 485, 485–86 (2003)).

[32] *See generally id.* at 471 (arguing that gay panic defense strategies are problematic because "they reinforce and promote negative stereotypes about gay men as sexual deviants and sexual predators" and they attempt to take advantage of existing unconscious bias in favor of heterosexuality); Cynthia Lee, *Masculinity on Trial: Gay Panic in the Criminal Courtroom*, 42 SW. L. REV. 817 (2013) [hereinafter Lee, *Masculinity on Trial*] (discussing how gay and trans panic defense strategies are problematic because they attempt to take advantage of conscious and unconscious bias against gay and trans individuals and also reinforce negative stereotypes about those groups; suggesting ways to defuse these tactics).

[33] *See* Sean Overland, *Strategies for Combating Anti-Gay Sentiment in the Courtroom*, THE JURY EXPERT, March 2009, at 1, http://www.thejuryexpert.com/wp-content/uploads/OverlandAntigaybiasTJEMarch09.pdf, *archived at* http://perma.cc/QP8X-SVMX ("[W]hile overt, anti-black sentiment has been largely relegated to the fringes of American society, homophobic attitudes remain common and socially-acceptable in large segments of the population.").

[34] Daniel M. Hinkle, *Peremptory Challenges Based on Religious Affiliation: Are They Constitutional?*, 9 BUFF. CRIM. L. REV. 139, 141, 146 (2005) (arguing that the "Constitution forbids the use of peremptory challenges based solely on . . . stereotypes about religions but that a juror's actual stated beliefs are a proper basis for exclusion even if those beliefs are religiously inspired").

efforts to protect gay and transgender venirepersons from discrimination in jury service.

I. Trends in Voir Dire About LGBT Issues and Sexuality

Voir dire on attitudes toward LGBT issues and sexuality could be appropriate in a number of contexts.[35] Depending on the circumstances, either prosecutors or defense attorneys (or both) may seek to voir dire on these issues.[36] Prosecutors might ask such questions in cases that involve LGBT victims, such as hate crimes or gay-bashings, fearing that homonegative jurors may accept a "gay panic defense" or be loath to convict of crimes with enhanced penalties.[37] Defense attorneys may want to inquire into gay-negative attitudes in any criminal case in which a gay or transgender defendant's identity will become known to jurors.[38] Research suggests that sexual assault and intimate partner violence cases carry a particular risk that anti-gay bias will play a role in the courtroom.[39] In such cases, defense attorneys may be

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[35] *See* Smith, *supra* note 20, at 105–10 (discussing how issues of sexual orientation might surface in criminal prosecutions involving gay-bashing crimes, as well as in cases in which LGBT people are charged with criminal offenses).

[36] *See* Lynd, *supra* note 3, at 246–47, 249. Lynd focused on cases such as Dan White's trial for the murder of Harvey Milk, in which defense counsel struck all jurors who were perceived to be queer. However, Lynd also noted that, "Both sides could find tactical benefit in knowing jurors' sexual orientations . . . ." *Id.*; *see also* State v. Snipes, No. COA10-442, 2011 WL 378798, at *2–4 (N.C. Ct. App. Feb. 1, 2011). In *Snipes*, the court rejected the defendant's claim that, in a rape case, the prosecution opened the door to cross-examination of the victim regarding her sexual orientation by asking a prospective juror who was a minister whether he preached against homosexuality, and by asking other venirepersons voir dire questions including:

> "Now in this case, you may hear evidence that one of the witnesses lives an alternative lifestyle and that she may be a lesbian."
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> "And again I will ask the three of you specifically, there may be some information about a witness that lives an alternative lifestyle."
>
> "There are folks in our society that participate in alternative lifestyles."
>
> "And there has been some talk that there may be some folks who testify that participate in an alternative lifestyle."
>
> "Any concerns about folks who may participate in alternative lifestyles?"

Id. at *2–6; *see also* State v. Aponte, 718 A.2d 36, 46–47 (Conn. App. Ct. 1998) (concluding that there was no error in exploring attitudes toward defendant's sexual orientation in voir dire when the victim in the child abuse case had referred to the defendant using "the Spanish slang for lesbian"), *rev'd in part on other grounds*, 738 A.2d 117 (Conn. 1999).

[37] *See* Smith, *supra* note 20, at 111–12 (describing the case of a lesbian couple attacked on the Appalachian trail, in which one woman was killed and the attacker attempted to claim "homosexual panic").

[38] *See* Aaron M. Clemens, *Executing Homosexuality: Removing Anti-Gay Bias from Capital Trials*, 6 Geo. J. Gender & L. 71, 78, 82–83, 87–90 (2005) (describing the potential for anti-gay bias in capital cases and in criminal trials more generally).

[39] *See* Jennifer M. Hill, *The Effects of Sexual Orientation in the Courtroom: A Double Standard*, 39 J. of Homosexuality 93, 102 (2000) (finding that gay men accused of sexually assaulting straight men were more likely to be perceived as guilty by jurors than straight men accused of assaulting women or gay men charged with raping other gay men

concerned that homophobia could induce jurors to convict more readily or of more serious offenses.[40] Both prosecutors and defense attorneys may seek to inquire into jurors' attitudes in situations in which the alleged violence was within the context of a same-sex relationship.[41] Anti-LGBT bias may be a concern when one of the people involved in the case is gay or transgender, even when the subject matter of the case does not directly involve LGBT issues.[42]

Jurors may be challenged for cause if they cannot be fair because of their beliefs about LGBT sexuality.[43] Courts have stated that disapproval of same-sex sexuality alone may not merit a challenge for cause if the juror states that she can nonetheless apply the law fairly.[44] Advocates may also

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and attributing this difference to homonegativity); Shane W. Kraus & Laurie L. Ragatz, *Gender, Jury Instructions, and Homophobia: What Influence Do These Factors have on Legal Decision Making in a Homicide Case Where the Defendant Utilized the Homosexual Panic Defense?*, 47 CRIM. LAW. BULL. 237, 240 (2011) ("Preliminary research demonstrates that homosexual victims and defendants are frequently treated unjustly by the courts, especially in sexual assault and domestic violence cases." (footnote omitted)); Bradley H. White & Sharon E. Robinson Kurpius, *Effects of Victim Sex and Sexual Orientation on Perceptions of Rape*, 46 SEX ROLES 191, 198 (2002) (finding that "negative attitudes toward gay men and lesbians were positively related to traditional gender role attitudes and to more blame assigned to a homosexual rape victim").

[40] *See also* Smith, *supra* note 20, at 103–06 (describing "routine disrespect" of poor gay and transgender people of color arrested for alleged sex work in local criminal courts and discussing a trial lawyer's concern that jurors might hold his client's homosexuality against her).

[41] *See id.* at 104 (describing how a transgender woman abused by her boyfriend was charged with assaulting him after police learned that she was transgender and became hostile to her).

[42] *See id.*

[43] *See*, *e.g.*, Multimedia WMAZ, Inc. v. Kubach, 443 S.E.2d 491, 493, 496 (Ga. Ct. App. 1994) (finding that the trial court did not abuse its discretion in excusing for cause three potential jurors "who expressed bias against homosexuals" in a case in which the plaintiff sued a TV station for damages for making his AIDS diagnoses public); State v. Salmons, 509 S.E.2d 842, 862 (W. Va. 1998) ("The trial judge went to great lengths to place on the record that the two jurors were not being struck because of their religion. The jurors were struck because they admitted they held prejudices against homosexuals. The trial court was not convinced by statements from both jurors that they would be able to put aside their biases toward homosexuals."); State v. Murray, 375 So. 2d 80, 83 (La. 1979) (concluding that the trial court was within its discretion to sustain the state's challenge for cause of two jurors who stated that "under no circumstances would they believe the testimony of a homosexual"); *see also* People v. Lee, Nos. 277551, 277552, 2008 WL 4276473, at *9–10 (Mich. Ct. App. Sept. 16, 2008) (in a case in which the appellate opinion describes the defendant as having a "transgender appearance," the trial court "asked the prospective jurors if they 'have any strong feelings about homosexuality that would prevent [them] from fairly hearing this trial or affect [their] verdict.' Each prospective juror responded, no. The court also asked each potential juror if he or she could be a fair and impartial juror in this case, to which each juror responded in the affirmative."). *See generally* Shauna C. Wagner, Annotation, *Examination and Challenge of State Case Jurors on Basis of Attitudes Toward Homosexuality*, 80 A.L.R.5th 469 (2000) (collecting cases that have discussed voir dire of jurors for prejudice against same-sex sexuality and developed rules about juror questioning on this issue).

[44] *See* People v. Simon, 100 P.3d 487, 493–95 (Colo. App. 2004) (acknowledging that "this juror's comments about homosexuality were troubling, especially given the nature of the case," but nonetheless concluding that the trial court's acceptance of the juror's assurance that "she would base her decision on the evidence and the court's in-

seek to test jurors' attitudes toward LGBT issues for the purpose of exercising peremptory challenges.[45]

Whether there is an inquiry into prejudice against gays—and the scope of such an inquiry—rests within the discretion of the trial court.[46] For this reason, appeals courts historically have been loath to reverse trial courts that have disallowed inquiry into jurors' attitudes toward LGBT people.[47] In criminal cases in which the issues potentially turn on the subject of prejudice, denying voir dire into possible biases may implicate constitutional due process or Sixth Amendment rights.[48] The fact that members of a minor-

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structions on the law," rather than her religious beliefs, "was not manifestly arbitrary, unreasonable, or unfair"); State v. Miller, 476 S.E.2d 535, 552–53 (W. Va. 1996) (concluding that the trial court did not abuse its discretion in declining to strike jurors who expressed homophobic attitudes for cause when jurors stated that they could be fair despite disapproval of same-sex sexuality).

[45] *See* State v. Dishon, 687 A.2d 1074, 1078, 1080–83 (N.J. Super. Ct. App. Div. 1997) (concluding that the defendant should not have been excluded from in camera voir dire regarding jurors' attitudes toward same-sex sexuality and that individual voir dire on these issues should not have continued after the defendant, who was accused of a gay-bashing crime, had exhausted his peremptory challenges).

[46] *See* Mu'Min v. Virginia, 500 U.S. 415, 427 (1991) ("[O]ur own cases have stressed the wide discretion granted to the trial court in conducting *voir dire* in . . . areas of inquiry that might tend to show juror bias."). *See generally* Wagner, *supra* note 43 (compiling appellate decisions applying the abuse of discretion standard to trial judges' decisions about the scope of examination and challenge of prospective jurors on the basis of their attitudes toward same-sex sexuality).

[47] *See, e.g.*, Gacy v. Welborn, 994 F.2d 305, 314 (7th Cir. 1993) (concluding that in the capital trial of serial killer John Wayne Gacy, the trial court did not err in declining to ask jurors "exactly what they thought about homosexuals," when they were asked "whether Gacy's homosexuality . . . would affect their judgment."); United States v. Click, 807 F.2d 847, 848, 850 (9th Cir. 1987) (concluding that the trial court did not abuse its discretion in refusing to ask a proposed voir dire question "designed to explore the jurors' attitudes toward homosexuals" in a bank robbery case in which the defendant was described as having "effeminate mannerisms"); State v. Lambert, 528 A.2d 890, 892 (Me. 1987) (finding that the trial court did not err in declining defendant's request to voir dire prospective jurors individually on their attitudes toward same-sex sexuality, when the trial court asked jury venire as a group whether any prospective juror possessed beliefs regarding homosexuality that would cause that juror to be less than fair and impartial); Toney v. Zarynoff's, Inc., 775 N.E.2d 301, 307 (Mass. App. Ct. 2001) (concluding that it was not an abuse of discretion to decline to question prospective jurors about possible anti-gay bias in a civil suit in which the plaintiff was gay, although the better practice would have been to make the inquiry); Commonwealth v. McGregor, 655 N.E.2d 1278, 1278–79 (Mass. App. Ct. 1995) (holding that it was not an abuse of discretion in a same-sex rape case to deny a request for individual voir dire of jurors regarding attitudes toward homosexuality); Commonwealth v. Proulx, 612 N.E.2d 1210, 1211–12 (Mass. App. Ct. 1993) (same); Commonwealth v. Boyer, 507 N.E.2d 1024, 1025–27 (Mass. 1987) (same in case alleging common nightwalking). *But see* State v. Lovely, 451 A.2d 900, 901–02 (Me. 1982) (concluding that the trial court abused its discretion in summarily refusing to ask jurors about anti-gay bias in a case in which the defendant was accused of setting fire to a gay bar that he may have frequented as a patron); State v. Van Straten, 409 N.W.2d 448, 453 (Wis. Ct. App. 1987) (upholding the trial court's lengthy individual voir dire on prospective jurors' attitudes toward AIDS and gay men as appropriate since the defendant was accused of spraying HIV-infected blood at his jailers).

[48] *See* Ham v. South Carolina, 409 U.S. 524, 525–27 (1973) (concluding that the trial court's refusal to question prospective jurors about possible racial prejudice violated due process in a case in which an African American civil rights worker claimed that local law

ity group are involved in a case does not by itself render voir dire for bias constitutionally mandated,[49] although it may be constitutionally required in certain "special circumstances,"[50] such as capital sentencing.[51] Of course, inquiry into possible bias may be prudent even if it is not constitutionally required;[52] the U.S. Supreme Court has exercised its supervisory power to direct federal trial courts to conduct voir dire on racial bias if requested by defendants in cases involving interracial violence.[53] There is huge regional diversity in the structure of voir dire, ranging from limited questioning conducted by the court to inquiries by advocates of varying scope, which may include questionnaires.[54]

Not too many years ago, voir dire about LGBT issues might have been conducted in a fashion that only compounded stigmatization of LGBT people, particularly if the individual at issue was the defendant in a serious crime.[55] Consider *State v. Rulon*,[56] a 1997 Missouri homicide case in which

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enforcement targeted him for marijuana charges); Aldridge v. United States, 283 U.S. 308, 313 (1931) (in a case out of the District of Columbia courts, the Supreme Court explained, "The right to examine jurors on the voir dire as to the existence of a disqualifying state of mind has been upheld with respect to other races than the black race, and in relation to religious and other prejudices of a serious character."); Ristaino v. Ross, 424 U.S. 589, 597 (1976) (explaining that, in *Ham*, voir dire on racial bias was constitutionally required because "[r]acial issues were inextricably bound up with the conduct of the trial" (discussing Ham v. South Carolina, 409 U.S. 524, 525–27 (1973))). *But see* Kemp v. Ryan, 638 F.3d 1245, 1261–63 (9th Cir. 2011) (rejecting Arizona prisoner's claim for federal habeas relief based on the alleged failure of the trial court to permit voir dire on issue of anti-gay bias, explaining, inter alia, that the defendant "has not offered any case law holding that homophobia should be elevated to the same level as racial prejudice").

[49] *Ristaino*, 424 U.S. at 597–98 (concluding that voir dire regarding racial prejudice was not mandated by the federal Constitution in every interracial crime). *See generally* Cynthia Lee, *Making Race Salient: Trayvon Martin and Implicit Bias in a Not Yet Post-Racial Society*, 91 N.C. L. Rev. 1555, 1590–93 (2013) [hereinafter Lee, *Making Race Salient*] (discussing Supreme Court doctrine on voir dire regarding racial bias).

[50] Turner v. Murray, 476 U.S. 28, 36–37 (1986) (describing *Ham*'s "special circumstances" rule (citing Ham v. South Carolina, 409 U.S. 524, 527 (1973))).

[51] *Id.* at 36–37 ("[A] capital defendant accused of an interracial crime is entitled to have prospective jurors informed of the race of the victim and questioned on the issue of racial bias." (footnote omitted)).

[52] *See Ristaino*, 424 U.S. at 597 n.9 (recognizing that, although voir dire on racial prejudice might not be constitutionally required in every interracial crime, the "wiser course" was to voir dire on the subject of racial prejudice, and that, if the case arose out of a federal trial court, the Supreme Court would have exercised its supervisory powers to direct trial judges to voir dire on the issue).

[53] Rosales-Lopez v. United States, 451 U.S. 182, 192 (1981) ("[F]ederal trial courts must make [an inquiry into racial prejudice] when requested by a defendant accused of a violent crime and where the defendant and the victim are members of different racial or ethnic groups.").

[54] Marie Comiskey, *Does Voir Dire Serve As a Powerful Disinfectant or Pollutant? A Look at the Disparate Approaches to Jury Selection in the United States and Canada*, 59 Drake L. Rev. 733, 742 (2011) (discussing a first-of-its-kind, state-by-state study of jury voir dire practices conducted by the National Center for State Courts in 2007, and stating that the "authors reported tremendous variation in jury selection procedures from state to state, including a traditional, limited voir dire with no questionnaire, general or case-specific questionnaires, individual questioning in the jury box, and group questioning").

[55] *See* Joan W. Howarth, *The Geronimo Bank Murders: A Gay Tragedy*, *in* 2 Sexuality and Law: Crime and Punishment 389, 399–406 (Ruthann Robson ed., 2011)

the defendant was accused of killing his same-sex partner.[57] He claimed self-defense, alleging that the partner had been abusive.[58] The defendant's own attorney conducted voir dire in a manner that invited conformity with strongly anti-LGBT social views. Defense counsel said to the jury panel (asking for a show of hands in front of the other venirepersons): "Many people believe that homosexuality is against God's law. I want to know how many people share that view?"[59] After more than half the venirepersons raised their hands, the defense attorney asked a follow-up question: "Any of you who—are there any of you who believe that homosexuality is against God's law who would be able to follow man's law instead, in this courtroom, and leave God's will up to God?"[60] The defendant was convicted of second-degree murder; his claim on appeal was that voir dire into jurors' attitudes toward homosexuality had been unduly restricted.[61] The Missouri Court of Appeals rejected this claim, stating that, "The court was quite generous in excusing for cause any venireperson that indicated an inability to be fair because of defendant's sexual preference."[62]

Recent cases demonstrate more adept attempts to gauge jurors' views. These more recent voir dire inquiries do not assume a broad anti-LGBT consensus, and accord prospective jurors more privacy in which to express their views. However, voir dire in similar cases might be strengthened yet further if advocates make more use of social science to gauge homonegative attitudes in potential jurors.

For example, the jury questionnaire from the *Ravi* case included four questions about LGBT issues and sexuality:

> Do you have any particular views on lesbian, gay, homosexual, and/or bisexual issues (e.g. Don't Ask Don't Tell, gay marriage, etc.)? If yes, please explain.
>
> Do you have any religious beliefs or other strong personal convictions which would make it uncomfortable or impossible for you to fairly and impartially consider a case involving homosexu-

(describing homophobic descriptions of gay defendants in jury selection in Geronimo, Oklahoma). *See generally Developments in the Law—Sexual Orientation and the Law*, 102 HARV. L. REV. 1508, 1541–55 (1989) (discussing gay men and lesbians as victims and defendants in the criminal justice system in the 1980s, and touching on issues relating to voir dire for anti-gay bias, arguing that "defense attorneys who anticipate references to a defendant's homosexuality or the presence of gay-related issues at trial should be entitled to conduct voir dire to discover anti-gay biases"); Sheila A. Skojec, Annotation, *Examination and Challenge of Federal Case Jurors on Basis of Attitudes Toward Homosexuality*, 85 A.L.R. FED. 864 (1987) (describing older cases in which dated attitudes limited voir dire on anti-gay bias).

[56] 935 S.W.2d 723 (Mo. Ct. App. 1997).
[57] *Id.* at 724.
[58] *Id.*
[59] *Id.*
[60] *Id.* at 725.
[61] *Id.* at 724.
[62] *Id.* at 726.

> ality as a sexual orientation or lifestyle and involving testimony concerning homosexual activity? If yes, please explain.
>
> Have you heard any stereotypes about homosexual individuals? If yes, explain.
>
> Have you ever used the internet to conduct research about someone who is homosexual? If yes, what website(s) did you use? What were the circumstances?[63]

The prosecutor also attempted to ask probing questions about the jurors' attitudes toward LGBT issues and sexuality in a 2011 case in Ventura County, California. In that case, teen Brendan McInerney was tried for the shooting of his junior high classmate Lawrence King, who identified as gay and was described by observers as gender nonconforming.[64] In this high-profile case, McInerney, who was fourteen years old at the time of the killing, was charged as an adult with premeditated murder and hate crimes.[65] Observers describe the defense as a claim of "gay panic," painting fifteen-year-old King as "flirtatio[us]" and "sexually aggressive."[66] In jury selection, prospective jurors were asked about their attitudes toward LGBT sexuality first in the juror questionnaire, and again in voir dire, which was conducted in groups of twelve in the jury box.[67] In the questionnaire, venirepersons were asked, "Do you have strong feelings or opinions about homosexuality or gender identity issues that would impact your ability to be a fair and impartial juror in a case involving these issues?"[68] In voir dire, prosecutor Maeve Fox asked questions along the following lines (not verbatim):

> What are your feelings about Gay Marriage?
>
> What are your feelings about Prop 8?
>
> Do you believe that the hate crimes law should apply to issues regarding sexuality and gender identity?
>
> If I held up a picture of two men kissing, would it make you uncomfortable? If so, can you gauge your level of discomfort for me?[69]

The proceedings ended in a hung jury, and McInerney ultimately pled guilty to second-degree murder and voluntary manslaughter.[70]

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[63] Email from Christopher Schellhorn to author, *supra* note 9.

[64] *See* Perkiss, *supra* note 16, at 785, 788–89.

[65] *Id.* at 788–89.

[66] *Id.* at 782–83, 790–93.

[67] Telephone Interview with Maeve Fox, Senior Deputy District Attorney, Ventura County District Attorney's Office (June 11, 2013).

[68] Juror Questionnaire at 10, People v. McInerney, No. 2008005782 (Ventura Cnty. Super. Ct. 2009) (on file with author).

[69] Email from Maeve Fox, Senior Deputy District Attorney, Ventura County District Attorney's Office, to author (June 11, 2013, 4:54 PM EST) (attachment) (on file with author).

[70] Perkiss, *supra* note 16, at 793–94.

While voir dire in the *Ravi* and *King* cases did attempt to gauge jurors' unstated or unconscious feelings about homosexuality, such inquiries might also benefit from using social science to assess prospective jurors' possible homonegative attitudes. In some hate crimes prosecutions, attorneys and judges simply ask venirepersons if they can be fair. As discussed further in Part II.A.,[71] "fairness" questions may be problematic because some venirepersons are understandably loath to admit—or are even unaware—that they cannot be fair.[72]

An example of a case in which fairness questions figured prominently was the David Jason Jenkins prosecution, an October 2012 federal prosecution in Kentucky for an alleged anti-gay hate crime.[73] The *Jenkins* case was the first prosecution under the Matthew Shepard-James Byrd Jr. Hate Crimes Prevention Act,[74] which was expanded in 2009 to cover crimes against gay and transgender victims.[75] Four defendants were prosecuted—Anthony Ray Jenkins, David Jason Jenkins, Mable Ashley Jenkins, and Alexis Leeann Jenkins.[76] Ashley and Alexis pled guilty to aiding and abetting a hate crime.[77] Anthony and Jason went to trial and were acquitted of the federal hate crimes charges, although the jury convicted them of kidnapping offenses.[78] The district court in the *Jenkins* case inquired whether jurors held any beliefs about gays that would prevent them from judging the facts fairly.[79] Noting that "[i]t's a little bit of an uncharted area," the inquiry was conducted at

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[71] *See infra* Part II.A.

[72] *See* Caroline B. Crocker & Margaret Bull Kovera, *The Effects of Rehabilitative Voir Dire on Juror Bias and Decision Making*, 34 LAW & HUM. BEHAV. 212, 212–13 (2010).

[73] *2 Kentucky Men Acquitted of Hate Crimes in 1st Prosecution Under U.S. Law Expanded to Protect Gays*, FOX NEWS (Oct. 25, 2012) [hereinafter *2 Kentucky Men*], http://www.foxnews.com/us/2012/10/25/2-ky-men-acquitted-hate-crimes-in-1st-prosecution-under-us-law-expanded-to, *archived at* http://perma.cc/8AAU-E6V7.

[74] *Id.*

[75] 18 U.S.C. § 249(a)(2) (2012) (providing federal criminal penalties for violent acts motivated by "actual or perceived religion, national origin, gender, sexual orientation, gender identity, or disability of any person"); *see Matthew Shepard & James Byrd, Jr., Hate Crimes Prevention Act of 2009*, DEP'T OF JUSTICE, http://www.justice.gov/crt/about/crm/matthewshepard.php (last visited Feb. 3, 2014), *archived at* http://perma.cc/F3LZ-J5MR; *see also* Kami Chavis Simmons, *Subverting Symbolism: The Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act and Cooperative Federalism*, 49 AM. CRIM. L. REV. 1863, 1865–66 (2012).

[76] United States v. Jenkins, Nos. 12-13-GFVT, 12-14-GFVT, 12-15-GFVT, 2013 WL 3158210, at *1 (E.D. Ky. June 20, 2013).

[77] *Id.* at *2 (describing the history of the case in a sentencing memorandum).

[78] *Id.*

[79] *E.g.*, Transcript of Record at 141–42, 144–45, United States v. Jenkins, Nos. 12-13-GFVT, 12-14-GFVT, 12-15GFVT (E.D. Ky. June 20, 2013) [hereinafter *Jenkins* Transcript of Record]. The defendant David Jason Jenkins's proposed voir dire asked not only about "prejudice towards or against homosexuals," but also, inter alia, "whether or not any of the potential veneer [sic] men have homosexual relations, friends or relationships." [Defendant's] Statement of the Case, Proposed Jury Instructions, Proposed Voir Dire, at 2, United States v. David Jason Jenkins, No. 6:12-CR-00015-GFVT-1 (E.D. Ky. Oct. 2, 2012). However, it does not appear from the voir dire transcript that the court asked this question. *Jenkins* Transcript of Record, *supra*.

the bench in individual voir dire.[80] The judge asked whether jurors had any personal feelings "either positive or negative" that "would cause you to judge someone who is gay or bisexual differently than someone else" or "that would make it difficult for you to be fair and impartial to both sides."[81] The court also told jurors that "this is a case that involves a law that the Congress of the United States has enacted that makes it a crime in certain circumstances to physically assault someone because of their sexual orientation," and asked whether they agreed or disagreed with the law.[82]

Voir dire on attitudes toward same-sex relationships also appears in cases in which the defendant—or both the defendant and the victim—are lesbians or gay men. Massachusetts courts have recognized since the mid-1990s that voir dire to identify possible anti-LGBT bias may be appropriate in cases involving gay victims.[83] One highly publicized case in Massachusetts in 2013 was the trial of Cara Rintala, who was accused of the homicide of her wife, Annamarie Rintala.[84] The case is believed to be the first alleged domestic violence homicide in Massachusetts involving a legally married lesbian couple.[85] The *Rintala* case produced a mistrial in March 2013,[86] leading to a retrial in January 2014 that also ended in a mistrial.[87] Voir dire in the 2013 trial included questioning along the following lines, conducted by the court at side bar during individual voir dire:[88]

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[80] *Jenkins* Transcript of Record, *supra* note 79, at 215 (The court explained: "I did make the decision to ask these questions at the bench. It's a little bit of an uncharted area in terms of how people respond and make sure we get honest responses, and it takes an extra amount of time, but feel like it's been important in this particular case").

[81] *Id.* at 139–40.

[82] *See, e.g.*, *id.* at 162.

[83] In 1996, the Massachusetts Supreme Judicial Court concluded that trial judges may—but are not required to—conduct individual voir dire of jurors in cases in which a victim is gay or bisexual. Commonwealth v. Plunkett, 664 N.E.2d 833, 838 & n.3 (Mass. 1996) (approving "general questions of the type the judge put to the venire collectively" as "sufficient in seeking to identify bias." The questions in *Plunkett* were: "[I]s there anything about [the fact that the victim was gay or bisexual] which would interfere with anyone's ability to be fair and impartial?" and "is there anything about that circumstance that would bias or prejudice anyone either the prosecution or the defense?" (internal quotation marks omitted)).

[84] The Republican Newsroom, *Hung Jury Results in Mistrial in Cara Rintala Murder Trial*, Mass Live (Mar. 13, 2013), http://www.masslive.com/news/index.ssf/2013/03/hung_jury_in_cara_rintala_murd.html, *archived at* http://perma.cc/PP8A-BBVA.

[85] *Id.*

[86] *Id.*

[87] The Republican Newsroom, *Cara Rintala Retrial Ends in Hung Jury; Judge Declares Mistrial*, Mass Live (Feb. 4, 2014), http://www.masslive.com/news/index.ssf/2014/02/cara_rintala_retrial_verdict.html, *archived at* http://perma.cc/QF9S-HLDV.

[88] Defendant's Proposed Voir Dire Questions, Commonwealth v. Rintala, No. HSCR2011-128 (Hampshire Super. Ct. Feb. 5, 2013) [hereinafter *Rintala* Defendant's Proposed Voir Dire Questions]. The State's proposed voir dire was similar:

> 1. Same-Sex Marriage: You will hear evidence that the defendant and the decedent were a same-sex married couple. Is there anything about that fact that might in any way prevent you from being a fair and impartial juror in this case? 2. Same-Sex Adoptive Parents: You will hear evidence that at the time of this incident, the defendant and the decedent were same-sex adoptive parents to a two-

5. The victim in this case is Annamarie Rintala and the defendant is Cara Rintala. Annamarie and Cara are lesbians who were legally married at the time of Annamarie's death. They had adopted a child and were raising her together at the time of Annamarie's death.
   a. Is there anything about these facts that would cause you to be anything less than completely fair and impartial in judging this case?
   b. Are you troubled at all by the fact that the victim and the defendant were partners in a gay marriage? Do you think that this would affect you in any way in deliberating on this case?
   c. Are you troubled at all by the fact that this lesbian couple had adopted a child and were raising her together? Do you think that this fact would affect you in any way in deliberating on this case?[89]

A similar inquiry was posed in another relatively recent Massachusetts case, *Commonwealth v. Almonte*.[90] Almonte was convicted of murder for the stabbing death of a man with whom he had a sexual relationship.[91] During voir dire, the court addressed each prospective juror as follows:

> There may be evidence in this case that the alleged victim engaged in a sexual relationship with the defendant as well as other men. Is there anything about either the defendant or the alleged victim's sexual orientation that would interfere with your ability to be fair and impartial?[92]

A Connecticut appellate court began to define the outer limits of voir dire on LGBT issues in 2009, concluding that some questions exceeded permissible attempts to gauge possible juror bias and instead were attempts to test a defense theory on the jury pool.[93] In that case, an Amtrak police officer was accused of the sexual assault of a university student to whom he offered

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year-old girl. Is there anything about that fact that might in any way prevent you from being a fair and impartial juror in this case?

Commonwealth's Proposed Jury Venire Voir Dire Questions, Commonwealth v. Rintala, No. HSCR2011-128 (Hampshire Super. Ct. Feb. 5, 2013).

[89] *Rintala* Defendant's Proposed Voir Dire Questions, *supra* note 88. Media reports of the 2014 retrial suggest voir dire questioning was similar, with the judge asking questions described as: "[D]oes the fact that Rintala and the victim were lesbians and married to each other bother prospective jurors enough to impair their ability to be objective and fair?" Jack Flynn, *Cara Rintala Retrial: Live Coverage of Day 1 of Jury Selection*, MASS LIVE (Jan. 7, 2014), http://www.masslive.com/news/index.ssf/2014/01/cara_rintala_retrial_live_cove.html, *archived at* http://perma.cc/EJ5X-YR3C.

[90] 988 N.E.2d 415 (Mass. 2013).

[91] *Id.* at 417–18.

[92] Telephone Interview with Kenneth E. Steinfield, Assistant District Attorney (May 22, 2013).

[93] State v. Thornton, 963 A.2d 1099, 1106–07 (Conn. App. 2009).

a ride home from the train station.[94] He was convicted of lesser-included offenses, second-degree unlawful restraint and fourth-degree sexual assault.[95] The defendant was married at the time of the incident.[96] Connecticut law provides a right to individual voir dire of prospective jurors in criminal cases, thus providing a relatively liberal opportunity to probe jurors' attitudes.[97] During the voir dire, the following colloquy ensued:

> [Defense Counsel]: This case is a male—an accusation of a male on male sexual assault. Is there anything about that type of accusation that would—you would feel uncomfortable sitting as a juror—
> [J]:[98] No . . . .
> [Defense Counsel]: And do you know anything about or have you heard anything about male on male sexual assault cases or incidents?
> [J]: No.
>
> * * *
>
> [Defense Counsel]: Next question is that do you have any male friends or family, male family members who you know to be gay?
> [J]: Yes.
> [Defense Counsel]: And have you ever discussed issues of violence committed against gay men with them?
> [J]: No.
> [Defense Counsel]: And you know the terms 'in the closet' or 'out of the closet'?
> [J]: Yeah.
> [Defense Counsel]: In the closet meaning people who may be gay but aren't publicly, to the world, letting anyone know.
> [J]: Right.[99]

At this point, defense counsel began asking questions about the prospective jurors' personal experiences with closeted gay male friends or family, drawing an objection from the prosecutor.

> [Defense Counsel]: Do you know anyone who you think might or might not be sort of gay but not publicly out there?
> [J]: Yes.

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[94] *Id.* at 1102–03.
[95] *Id.* at 1103.
[96] *Id.* at 1105. Presumably, the defendant was married to a woman at the time of the 2005 incident, because same-sex marriage was not recognized in Connecticut until 2008. *See* Kerrigan v. Comm'r of Pub. Health, 957 A.2d 407, 412 (Conn. 2008).
[97] *Thornton*, 963 A.2d at 1106 (citing CONN. GEN. STAT. §§ 54-82f, 54-82g (2013)).
[98] "[J]" refers to the fifth prospective juror. *Id.* at 1104.
[99] *Id.* (brackets in original) (internal quotation marks omitted).

> [Defense Counsel]: And kind of what kind of—what makes you think that they might be?
> [The Prosecutor]: Well, at this point, I think I'm going to object to that question, if Your Honor, please. I think that's going far field [sic], and I object to it.[100]

The court asked the prosecutor why he was objecting at that time to this line of questioning, since the same questions had been asked before without objection.[101] The prosecutor responded that he had been waiting to object to queries "about males with regard to coming out of the closet, whether they are gay or not."[102] He also stated that defense counsel should articulate a reason why these questions related to the case.[103]

Noting that his client was a married man with a child, defense counsel responded that he needed to know jurors' attitudes toward men who are struggling with their sexuality.[104] Counsel stated that he felt he had to gauge how prospective jurors would react to the defendant.[105] He said:

> I've never defended a same sex case; I've defended and prosecuted a number of male-female cases. . . . That issue was not an issue in those kinds of cases. I wouldn't have to go there in those kinds of cases. In this case . . . I do have to voir dire on it because . . . these people . . . are going to be thinking about those facts about the complaining witness, and they're going to . . . be thinking about it about my client. And so I do think I . . . have to go there to a certain degree. . . . I'm very uncomfortable doing it, but I think in this case it's very, very important.[106]

The trial court sustained the prosecutor's objection to this line of questioning.[107] It explained that, "the sexual orientation of either the defendant or the [victim] is not relevant to the jury's consideration here."[108] The court said, "[t]his is an accusation of fact," and that the "root motivation" was not relevant.[109] It ruled that it would allow some questioning along defense counsel's lines if "the whole question of someone's struggling with their sexuality was . . . explicitly in the case."[110] Nonetheless, it concluded that Connecticut law did not permit attorneys to "test out" jurors' "reaction . . . to the facts" in voir dire.[111]

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[100] *Id.* (brackets in original) (emphasis omitted) (internal quotation marks omitted).
[101] *Id.*
[102] *Id.* at 1104–05 (internal quotation marks omitted).
[103] *Id.* at 1105.
[104] *Id.*
[105] *Id.*
[106] *Id.* at 1105 n.11 (internal quotation marks omitted).
[107] *Id.* at 1105.
[108] *Id.* (internal quotation marks omitted).
[109] *Id.* (internal quotation marks omitted).
[110] *Id.* (internal quotation marks omitted).
[111] *Id.* (internal quotation marks omitted).

When the fifth prospective juror returned to the stand, defense counsel stated, "I take it that there is nothing about a same sex sexual assault, that allegation alone, that would make you uncomfortable about sitting and hearing the facts and the evidence and being fair to both sides."[112] After agreeing with that statement, the venire member was seated as a member of the jury.[113] For the remainder of the voir dire, attorneys for both sides continued to ask prospective jurors if they or anyone they knew had been the victim of or accused of a sexual assault, and whether there was anything that would prohibit them from being fair in a same-sex sexual assault case.[114] The court excused for cause those jurors who responded "yes" to either of those questions.[115]

Following his conviction for lesser-included offenses, the defendant appealed the trial court's resolution of this voir dire issue.[116] The Appellate Court of Connecticut affirmed the trial court's ruling,[117] reasoning that, although a criminal defendant has the right to challenge jurors who "are unable to set aside preconceived notions," a defendant cannot win on appeal simply by "asserting that a prohibited line of questioning would have exposed potential bias."[118] It reasoned that attempts to question prospective jurors regarding "assumptions or hypotheses concerning the evidence which may be offered at the trial . . . should be discouraged."[119] The court explained that such questions were often an attempt to test a defense theory, "to implant in [the juror's] mind a prejudice or prejudgment on [certain] issues."[120] The appellate court noted that defense counsel was permitted to ask "questions regarding attitudes toward homosexuality in general," and that "[i]n a case concerning a male on male, or female on female, sexual assault, relevant questions that delve into prejudices, beliefs and attitudes toward homosexuality should be permitted."[121] Ultimately, it affirmed the defendant's conviction.[122] The Supreme Court of Connecticut denied certification.[123]

On a doctrinal level, this case grapples with the outer limits of questioning that a defendant can demand when delving into prospective jurors' experiences with LGBT issues.[124] Its appearance in the criminal justice system

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[112] *Id.* (internal quotation marks omitted).
[113] *Id.*
[114] *Id.* at 1105.
[115] *Id.* at 1105–06.
[116] *Id.* at 1101–03.
[117] *Id.* at 1108–09.
[118] *Id.* at 1106 (internal quotation marks omitted).
[119] *Id.* (internal quotation marks omitted).
[120] *Id.* at 1107 (emphasis omitted) (internal quotation marks omitted).
[121] *Id.* at 1107–08.
[122] *Id.* at 1108–09.
[123] State v. Thornton, 970 A.2d 727, 727 (Conn. 2009).
[124] *See also* Shaw v. Hedgpeth, No. C 10-5800 LHK (PR), 2012 WL 2906243, at *1, *3, *5–6 (N.D. Cal. July 16, 2012) (rejecting a California prisoner's claim for federal habeas relief; the prisoner had asserted that the state trial court had unduly restricted voir

also illustrates how issues of actual or perceived sexual orientation may present themselves as more cases involving male sexual victimization make their way into the legal system. As the defense attorney's comments underline, *Thornton* also demonstrates some criminal justice actors' lack of experience in dealing with same-sex allegations, as well as potential concerns about identifying anti-LGBT sentiment in the jury pool.

II. Voir Dire on Contested Terrain: Toward Best Practices

Scholars working on issues of racial bias in the courts focus increasingly on issues of implicit bias.[125] Important scholarship in this area is grounded in social science research on cognition.[126] That research demonstrates that, in psychological testing, the vast majority of white Americans demonstrate implicit bias against African Americans, and a similar majority of straights manifest bias against gays, regardless of whether they report conscious feelings of prejudice.[127] At this time of rapidly changing and divided attitudes toward same-sex sexuality,[128] we are not yet at a point where we can concentrate entirely on eradicating this implicit bias. While prospective jurors in the United States in the twenty-first century are unlikely to voice express racial bias in voir dire, some jurors continue to express disapproval of same-sex sexuality, sometimes rooted in religious belief. In the social science literature, such beliefs are described as "old-fashioned

dire on his anticipated defense of "homosexual panic," but the federal court denied relief, concluding that there was no right to voir dire the jurors specifically on their attitudes toward that issue).

[125] *See* Jerry Kang & Kristin Lane, *Seeing Through Colorblindness: Implicit Bias and the Law*, 58 UCLA L. Rev. 465, 465 (2010) (explaining that while "central civil rights questions" were once "indisputably normative," they now focus on "the underlying empirics," including questions like whether we in fact live in a "colorblind society").

[126] *See, e.g.*, Lee, *Making Race Salient*, *supra* note 49, at 1592–93 (arguing that attorneys should not ask prospective jurors in voir dire if they hold racial biases, but rather should educate venirepersons about implicit bias and about the role of race in the case). *See generally* Jerry Kang et al., *Implicit Bias in the Courtroom*, 59 UCLA L. Rev. 1124 (2012) [hereinafter Kang et al., *Implicit Bias in the Courtroom*] (suggesting strategies to counter implicit bias in the courtroom); Anna Roberts, *(Re)Forming the Jury: Detection and Disinfection of Implicit Juror Bias*, 44 Conn. L. Rev. 827 (2012) (discussing how the Implicit Association Test could be used).

[127] *See* Lee, *The Gay Panic Defense, supra* note 31, at 539–40 ("Eighty-eight percent of Whites who have taken the [Implicit Association Test] have manifested implicit bias in favor of Whites and against Blacks. Nearly 83% of heterosexuals have manifested implicit bias in favor of straight people over gays and lesbians."); *see also* Perkiss, *supra* note 16, at 806–16 (describing Lee's proposals, based on social science research on implicit bias, for addressing implicit anti-gay and anti-trans bias).

[128] *See* John Harwood, *A Sea Change in Less Than 50 Years as Gay Rights Gained Momentum*, N.Y. Times (Mar. 25, 2013), http://www.nytimes.com/2013/03/26/us/in-less-than-50-years-a-sea-change-on-gay-rights.html, *archived at* http://perma.cc/N5XL-J5KM (reporting that 53% of survey respondents favored legal recognition of same-sex marriages).

homonegativity."[129] The reality of "competing moral views of homosexuality"[130] is the first LGBT-related issue that judges and lawyers are likely to confront in voir dire. For this reason—as well as the fact that LGBT identity is often not manifest—voir dire to identify anti-gay bias differs in significant ways from questioning to uncover racial bias.

In an important 2008 article, *The Gay Panic Defense*, Professor Cynthia Lee drew on social science research to suggest means for uncovering anti-gay bias in voir dire and reducing its influence in jury deliberations.[131] In this Part, I expand on and critique the strategies outlined in Lee's article. My major departure from Lee's work on implicit bias is that, as I demonstrate with transcript excerpts, many jurors *do* in fact express homonegative beliefs, and those jurors often are *not* removed for cause. Lee writes that, "Just as few individuals are likely to answer affirmatively if asked, 'Are you prejudiced against Blacks?' few individuals are likely to admit that they are prejudiced against gays and lesbians."[132] She goes on to identify three possible categories of jurors: "explicit homophobes" who will voice their bias, "closet homophobes" who are biased against LGBT persons but will not say so publicly, and "implicit homophobes" who believe that they are egalitarian but have unconscious biases.[133] Lee writes that the "explicit homophobes" would "likely be subject to a challenge for cause."[134] Lee then focuses on voir dire questions to identify the "closet homophobes."[135] If "explicit homophobes" and most "closet homophobes" are removed from the jury, Lee reasons, attorneys can focus on techniques to "make[ ] sexual orientation salient" that will help guard against the influence of implicit anti-gay bias in deliberations.[136]

This Part takes Lee's article as a starting point, both building on and taking issue with some of her work's assumptions, specifically the premise that jurors who express anti-LGBT bias necessarily will be removed for cause. The Part is in four subparts. As I demonstrate in Part II.A, many jurors who express moral disapproval of homosexuality or who are affiliated with religions that condemn LGBT sexuality likely will *not* be removed for

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[129] Melanie A. Morrison & Todd G. Morrison, *Development and Validation of a Scale Measuring Modern Prejudice Toward Gay Men and Lesbian Women*, 43 J. HOMOSEXUALITY 15, 17–18 (2002) (describing "old-fashioned" anti-gay prejudice as "prejudice rooted in traditional religious and moral beliefs and misconceptions about homosexuality," and contrasting it with "modern" homonegativity, which is characterized by beliefs including the notion that gay men and lesbians are making illegitimate demands for change because anti-LGBT discrimination has been eradicated).

[130] Perkiss, *supra* note 16, at 813–14 (advocating express discussion of homophobia in cases involving gay and trans panic defenses because "[v]oicing competing moral views of homosexuality is more likely in groups" and can help to defeat bias).

[131] Lee, *The Gay Panic Defense, supra* note 31, at 476–77.

[132] *Id.* at 561.

[133] *Id.*

[134] *Id.* at 562.

[135] *Id.* at 562–63.

[136] *Id.* at 563–64.

cause.[137] I argue that jurors who express hostility toward LGBT sexuality *should* be removed for cause in cases involving LGBT issues, even if jurors' anti-gay beliefs are rooted in religious teachings. In Part II.B, I expand on Lee's work on voir dire questions to uncover unspoken or implicit bias. In Part II.C, I point out a potential collision course in gauging homophobia by inquiring about jurors' religious affiliations: strikes based on religious identification alone may be impermissible. Part II.D concludes by emphasizing that the cognitive science research discussed in work by Lee and others suggests both useful voir dire questions to identify anti-gay sentiment and tools for reducing its influence in jury deliberations.

A. "Explicit[138]-But-Fair" Homonegativity: Challenges for Cause

Reported decisions and voir dire transcripts reveal that some jurors, even in relatively liberal jurisdictions, continue to express disapproval of homosexuality, sometimes citing religious beliefs.[139] These statements range from assertions of moral or religious beliefs that homosexuality is wrong ("I think that they are morally wrong;"[140] "[M]y religious convictions tell me that homosexuality is a sin;"[141] "I'm a Catholic, my religion"[142]) to outright

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[137] *Cf. id.* at 561 (describing "closet homophobes" as "individuals who will not say publicly that they think gays are immoral and deviant, but actually believe that gays are immoral and deviant").

[138] *Id.* (discussing the term "explicit homophobe"); Kang, et al., *Implicit Bias in the Courtroom, supra* note 126, at 1132 ("[E]xplicit biases are attitudes and stereotypes that are consciously accessible through introspection and endorsed as appropriate." (emphasis omitted)).

[139] *See* People v. Simon, 100 P.3d 487, 494–95 (Colo. App. 2004) (concluding that the trial court did not abuse its discretion in denying defendant's challenge for cause as to a particular juror even though the juror who, when she learned the case "involved allegations of a homosexual relationship . . . said it made her feel 'sick'" and "explained that her belief system 'says homosexuality is wrong,'" because she said "she would base her decision on the evidence and the court's instructions on the law"); State v. Miller, 476 S.E.2d 535, 552–53 (W. Va. 1996) (concluding that the trial court did not abuse its discretion in declining to strike jurors who expressed homophobic attitudes for cause, when jurors stated that they could be fair despite disapproval of same-sex sexuality).

[140] Transcript of Record at 32–33, Commonwealth v. Miller, No. ESCR-01-1169 (Essex Super. Ct. May 10, 2004) [hereinafter *Miller* Transcript of Record] ("I do not believe that people are born homosexuals. I believe that they are, through some kind of circumstance, they develop that inclination. . . . I think that they are morally wrong.").

[141] Transcript of Record at II-33, Commonwealth v. Miller, No. ESCR-01-1169 (Essex Super. Ct. May 11, 2004) ("[M]y religious convictions tell me that homosexuality is a sin, as far as that goes.").

[142] Transcript of Record at 133, Commonwealth v. Almonte, 988 N.E.2d 415 (Mass. 2013) (No. SJC-11027) [hereinafter *Almonte* Transcript of Record] (excusing a juror for cause after stating that the evidence in the case would involve same-sex sexuality; the court asked whether "that would interfere with your ability to decide what the facts are from the evidence and follow my instructions of law?" and the juror responded, "I'm a Catholic, my religion," and agreed that would affect how she decided the facts).

animus ("I just don't like queers"[143]); to ambivalent feelings ("I hope I would be able to see past that, but I can't guarantee you that, no"[144]).

Courts have concluded that these jurors can be challenged for cause if they cannot be impartial due to their beliefs about homosexuality.[145] However, some courts have said that jurors need not be removed for cause based on a religious belief that homosexuality is wrong, provided that the trial judge is convinced by the jurors' assurances that they can put aside their religious beliefs and evaluate the facts of the case fairly.[146] This can some-

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[143] *Miller* Transcript of Record, *supra* note 140, at 189. The juror was excused for cause after the court asked, "Do you think there is anything about [evidence of same-sex relationships] that you think would get in the way of your ability to be a fair and impartial juror?" and the juror responded, "No, I don't think so. I just don't like queers." *Id.*

[144] *Almonte* Transcript of Record, *supra* note 142, at 112–13 (excusing the juror after he was asked whether the sexual orientation of the defendant or victim would cause him to be less than fair and impartial, and he responded, "I would hope that I could be partial [sic], but I honestly don't know if I could be impartial").

[145] This determination is committed to the trial courts' discretion. *See* Skilling v. United States, 130 S. Ct. 2896, 2918 (2010) (explaining that "estimation of a juror's impartiality" is entrusted to the trial court's discretion because the trial court can assess "the prospective juror's inflection, sincerity, demeanor, candor, body language, and apprehension of duty"); *see also* State v. Salmons, 509 S.E.2d 842, 862 (W. Va. 1998) ("The trial judge went to great lengths to place on the record that the two jurors were not being struck because of their religion. The jurors were struck because they admitted they held prejudices against homosexuals. The trial court was not convinced by statements from both jurors that they would be able to put aside their biases toward homosexuals."); Multimedia WMAZ, Inc. v. Kubach, 443 S.E.2d 491, 493, 496 (Ga. Ct. App. 1994) (concluding that the trial court did not abuse its discretion in excusing for cause three potential jurors "who expressed bias against homosexuals" in a case in which the plaintiff sued a TV station for damages for making public the fact of his AIDS diagnosis); State v. Murray, 375 So. 2d 80, 83 (La. 1979) (concluding that the trial court was within its discretion to sustain the state's challenge for cause to two prospective jurors who stated that "under no circumstances would they believe the testimony of a homosexual").

[146] *See* United States v. Elfayoumi, 66 M.J. 354, 357 (C.A.A.F. 2008); *see also, e.g.*, Loomis v. United States, 68 Fed. Cl. 503, 511–12 (Fed. Cl. 2005) (concluding that a service member was not denied due process in a separation hearing under "Don't Ask, Don't Tell," when potential jurors stated that they had religious or moral objections to homosexuality, but that they could put aside those feelings to judge the evidence); People v. Simon, 100 P.3d 487, 494–95 (Colo. App. 2004) (acknowledging that "this juror's comments about homosexuality were troubling, especially given the nature of the case," but nonetheless concluding that the trial court's acceptance of the juror's assurance that "she would base her decision on the evidence and the court's instructions on the law," rather than her religious beliefs, "was not manifestly arbitrary, unreasonable, or unfair"); Baker v. State, 498 S.E.2d 290, 292 (Ga. Ct. App. 1998) ("A belief in God's ultimate judgment does not automatically preclude a person from fairly and impartially sitting in judgment of others based upon the laws of the commonwealth."); Turner v. Commonwealth, 153 S.W.3d 823, 825–26, 833 (Ky. 2005), *overruled on other grounds by* Padgett v. Commonwealth, 312 S.W.3d 336 (Ky. 2010) (rejecting the claim by the lesbian defendant in a murder, burglary, and theft case that the trial court erred in refusing to strike four jurors for cause when the jurors stated that they believed homosexuality was wrong but that they could be fair); People v. Rodriguez-Arango, No. 297065, 2011 WL 4467680, at *2 (Mich. Ct. App. Sept. 27, 2011) (rejecting the claim that trial counsel was ineffective for failing to exercise peremptory strikes to remove jurors who expressed disapproval of homosexuality). In *Rodriguez-Arango*, the Michigan court reasoned:

> A juror is impartial if the juror can lay aside any impressions or opinions and render a verdict based on the evidence presented in court. The first juror clearly

times involve "rehabilitative" questioning, in which judges ask jurors who have expressed biases whether they can put them aside.[147]

For example, in 2008, the U.S. Court of Appeals for the Armed Forces concluded that "the military judge did not abuse his discretion in denying a challenge for cause" in a case alleging a same-sex sexual assault when a prospective juror indicated that he disapproved of homosexuality on moral grounds, but that he could put aside his feelings.[148] The colloquy between the trial court and the juror was as follows:

> MJ: Earlier you indicated you had some strong objections to homosexuality?
> MEM: That is correct, sir.
> MJ: Could you explain a little bit about that.
> MEM: I feel that it is morally wrong. It is against what I believe as a Christian and I do have some strong opinions against it.
> MJ: You notice[] on the [charge sheet] that the word "homosexual" is not there?
> MEM: Yes, sir.
> MJ: But there are male on male sexual touchings alleged.
> MEM: Yes, sir.
> MJ: Do you think, with your moral beliefs that you can fairly evaluate the evidence of this case given the nature of the allegations?
> MEM: Yes, sir.
> MJ: Let's say we get to sentencing and the accused is convicted of some or all of the [offenses] . . . . Let's talk about these offenses involving indecent assault and the forcible sodomy. If it got to that point in the trial and the accused was convicted of some or all of those offenses, do you think you could fairly consider the full range of punishments?
> MEM: Yes, sir.

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stated that she believed homosexuality is wrong, but she also stated that she would not assume that defendant was guilty simply because of his homosexuality. The second juror expressly stated that he was a Christian and did not believe in homosexuality, but that he could set aside his religious beliefs and would work hard to reach a fair and impartial decision. Thus, both jurors made statements indicating that they could set aside their opinions on homosexuality and render a verdict based on the evidence.

Id. (citation omitted); *see also* State v. Miller, 476 S.E.2d 535, 552–53 (W. Va. 1996) (concluding that the trial court did not abuse its discretion in declining to strike jurors who expressed homophobic attitudes for cause, when jurors stated that they could be fair despite disapproval of same-sex sexuality).

[147] *See* Crocker & Kovera, *supra* note 72, at 213 ("[J]udges may rehabilitate venirepersons who hold biases that would otherwise render them ineligible for jury service.").

[148] *Elfayoumi*, 66 M.J. at 355, 357.

> MJ: Do you think you could honestly consider not discharging the accused even with that kind of conviction?
> MEM: I would have a hard time with that, sir.
> MJ: Could you consider it though?
> MEM: Yes, sir.
> MJ: After hearing the entire case, you wouldn't [categorically] exclude that?
> MEM: No, sir.
> MJ: Now understanding there may be administrative[] consequences and we all know those, but as a court member, that's not your concern. Do you understand that?
> MEM: Yes, sir.[149]

More recently, in the 2012 federal hate crimes prosecution in Kentucky, *Jenkins*, eleven prospective jurors expressed disapproval of homosexuality.[150] A number of prospective jurors who said they could be fair despite their disapproval of homosexuality were not challenged for cause.[151] The court did excuse for cause four jurors who stated expressly that they could not be fair because of their negative feelings about gays and bisexuals,[152] one juror who "hesitated" in responding "probably, yes," when asked if she

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[149] *Id.* at 355 (alterations in original) (footnote omitted).

[150] *See, e.g.*, *Jenkins* Transcript of Record, *supra* note 79, at 124–25 ("I have a negative preference [against gays and bisexuals] . . . I'm opposed to gay activity . . . ."); *id.* at 139 ("I have a problem with it as far as being wrong; it's wrong. I know that."); *id.* at 141 ("I've got just personal beliefs. I just don't think that it's right to be that way . . . .").

[151] For instance, there was no challenge for cause against the juror who stated that he had a "negative preference" against gays and bisexuals and was "opposed to gay activity," but who responded affirmatively when asked if he could "put any bias or preferences [he had] aside and be fair and impartial." *Id.* at 124–25. Nor was there a challenge for cause against jurors who stated, "it's wrong," *id.* at 139; "I just don't think that it's right to be that way," *id.* at 141; "my religious belief is the biggest issue I have, and . . . it's not an issue with the case. It's just something that would not be for me," *id.* at 226; and "another trial might be easier. But like I said before, I would put my personal feelings aside and go by the law," *id.* at 278. There was also no challenge for cause against a juror who stated that, "I have friends I know that are that way," but that he was opposed to federal hate crimes legislation because he felt the federal government had "more important things . . . to be doing," and that he did not know it was a "big federal law if you assault because of [their sexual orientation]." *Id.* at 258–60.

[152] The court excused for cause a juror who said she had "religious beliefs" and "religious point of views" about homosexuality, and that she "would like to hope" she wouldn't treat someone gay or bisexual differently, and that she "would like to hope that [she] could be fair," but that she had not "had enough experience in that area" to know for sure how she would react. *Id.* at 155–59, 319–20. A juror who stated that she believed "it's wrong," and who responded "probably so" to the question whether "it would be difficult for you to be fair in a case like this," also was struck for cause. *Id.* at 206–07, 324. Jurors were also excused for cause when they responded affirmatively that it would be difficult for them to put aside their feelings and follow the instructions in the case because of their feelings about gays and lesbians, *id.* at 222, 323–24; and that "I've never been around anyone like that [LGBT]," and "I do not understand any of that, so it would make me a little impartial" and be hard to predict how he would react, *id.* at 245, 248, 323.

could put aside moral feelings about gays and lesbians in judging the facts,[153] and one juror who stated that "there ain't no place in heaven [for gays and lesbians], and "the Bible says stay away from those kind of people."[154] Other jurors (not counted in the eleven referred to above) were removed for cause because they said that their opposition to federal hate crimes legislation for gays and lesbians meant they would not be able to follow the court's instructions or be fair.[155] Four jurors who expressed strong personal feelings regarding same-sex sexuality (typically disapproval) were removed by peremptory strikes, which both parties conducted simultaneously off-the-record.[156] One who said, "[I]t's wrong. I know that," sat on the jury.[157]

In the *Jenkins* trial, rehabilitative questioning took place during the voir dire of jurors who stated they had personal views about homosexuality. For example, one prospective juror, when asked whether she "might have a tendency to treat somebody who is gay or bisexual differently than someone else, it could be more positively, it could be more negatively, but that you would treat them different than someone else," responded in part, "I would have to really put my personal feelings aside and know that I couldn't judge them on that. But I would have to dig deep within to decide."[158] The court then asked, "is there any reason that . . . those views . . . would make [it] difficult for you to be fair or impartial to either side here?"[159] The juror responded, "It would be a struggle. It would be difficult. It wouldn't be impossible, but it would be a personal struggle."[160] The court then asked

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[153] The court permitted a challenge for cause "out of an abundance of caution" against a prospective juror who responded "[y]es" to the question, "Do you have a kind of an ethical or a moral feeling about homosexuality?" and who, when asked whether she could "put that aside and be fair and impartial in this case," responded, "Probably, yes." *Id.* at 129–30, 327.

[154] *Id.* at 162–65, 332.

[155] *Id.* at 241–42, 279–80, 318, 323.

[156] After challenges for cause were exercised, the court clerk randomly selected a pool of thirty-three jurors. *Id.* at 339. These four jurors were included in that pool of thirty-three. *Id.* at 339–40. The attorneys then exercised their peremptory strikes (a total of nineteen for both sides combined) simultaneously off the record. *Id.* at 337–38, 349. The court clerk then called the numbers of fourteen jurors who would comprise the jury—twelve jurors and two alternates. *Id.* at 349. These four jurors were not included in the final fourteen, and so presumably were eliminated through peremptory challenges. *See id.* at 337–52. The four included a juror who stated he had a "negative preference toward gays" and that he was "opposed to gay activity," *id.* at 124–25; one who stated "I just don't think it's right to be that way," *id.* at 141; a juror who said he had a "religious belief" against gays and lesbians and hesitated in saying that he could put that aside, *id.* at 226–27; and one juror who stated that "it would be a personal struggle" to be fair and impartial in this case given personal feelings about gays and lesbians, *id.* at 276–78.

[157] The juror who sat on the jury stated, "I have a problem with it [being gay or lesbian] as far as being wrong; it's wrong. I know that." *Id.* at 139, 349. In response to follow-up questioning from the court during voir dire, the juror also stated, "But as far as abuse of that person, that ain't right either," and responded "no" when asked whether there was "[a]nything about your personal view about homosexuality that would make it difficult . . . to be fair and impartial to both sides in this particular case?" *Id.* at 139–40.

[158] *Id.* at 276.

[159] *Id.* at 276–77.

[160] *Id.* at 277.

whether she could "focus on the evidence presented in court" and "apply the law as I give it to you."[161] The juror responded, "Yes."[162] The court asked, "Do you think you could follow those instructions?"[163] The juror responded, "I would have to."[164] During discussion of possible challenges for cause, one defense attorney stated, "I think she rehabilitated actually very nicely."[165] The juror was not challenged for cause,[166] and ultimately was removed through a peremptory strike.[167]

Jurors express similar beliefs in "blue" states too. In one 2009 Massachusetts prosecution alleging a homicide in the context of a same-sex relationship,[168] the following exchange occurred during voir dire, again illustrating rehabilitative questioning:

> The Court: [T]here may be evidence in the case that the alleged victim and the defendant engaged in a sexual relationship and that the alleged victim may have engaged in a sexual relationship with other men. Anything about the defendant or the alleged victim's sexual orientation that you think would get in the way of your ability to be fair?
> Juror: I am a born again Christian, and the word of God speaks on homosexuality, and that it is sinful behavior.
> The Court: Would that affect your ability to be fair in deciding the facts of this case?
> Juror: I would try to be as fair as I could be, yes.
> The Court: Do you think that . . . [y]our religious beliefs, do you think that your religious beliefs about homosexuality would impact how you decide what happened in this case if there's evidence of homosexuality?
> Juror: If you're asking me if that would confuse my understanding of the facts, I would have to say it would not.
> The Court: I'm glad you asked for a clarification because that's not what I'm saying. If you're a juror, jurors come to cases with all sort of attitudes, opinions, views, morals, religious, political. We don't expect jurors to come in here with no views of the world. That . . . wouldn't be a very good system of justice.
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> The question is whether a juror's particular view of the world, such as your religious views, would get in the way of your ability to decide what happened in this case from the evidence and follow the instructions of law. It may be for some people in your position

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[161] *Id.*
[162] *Id.*
[163] *Id.*
[164] *Id.*
[165] *Id.* at 328.
[166] *Id.* at 327–28.
[167] *See id.* at 340, 349.
[168] Commonwealth v. Almonte, 988 N.E.2d 415, 417–18 (Mass. 2013).

> that it would, maybe in some people in your position that it wouldn't. The question is whether you can compartmentalize your mind and decide the facts of this case separate and distinct from what your own personal political or religious views might be or whether you think that might be the prism through which you decide what happened.
> Juror: I think that I would be able to fairly make a decision based on the facts.
> The Court: Okay.[169]

At a side bar conference, the judge found the prospective juror "indifferent," declining to excuse her for cause.[170] The defense then exercised a peremptory challenge to excuse the venireperson.[171]

As these examples demonstrate, it is possible that someone who expresses gay-negative beliefs may in fact survive a challenge for cause, if the trial court is confident that the juror can follow instructions and be fair. Questions like those asked in the *Jenkins* and *Almonte* cases, which focus on whether jurors can put aside their anti-gay feelings to be "fair" or "impartial," are likely to elicit responses that jurors believe they can be fair. As psychologists Caroline Crocker and Margaret Kovera have explained, "People want to believe that they can be fair and are unlikely to admit that they cannot set aside their biases."[172] Arguably, all but the most self-aware—or stridently homophobic—would likely assert that they could put aside their disapproval of gays in judging the facts of the case. For this reason, the U.S. Supreme Court has emphasized that a trial court is not supposed to accept "venire members who proclaim[ ] their impartiality at their word," but is also entrusted with evaluating their "demeanor and credibility."[173]

As a normative matter, it seems wrong to permit jurors who express strong anti-gay attitudes to serve in cases presenting LGBT issues.[174] It is hard to imagine a situation in which a prospective juror who said that she believed that a particular racial or ethnic group was morally inferior would be permitted to remain on the jury so long as she promised to put aside those feelings in evaluating the evidence.[175] Four Justices of the U.S. Supreme

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[169] *Almonte* Transcript of Record, *supra* note 142, at 167–69.
[170] *Id.* at 169–70.
[171] *Id.* at 170.
[172] Crocker & Kovera, *supra* note 72, at 213.
[173] Skilling v. United States, 130 S. Ct. 2896, 2923 (2010).
[174] *But see* Clemens, *supra* note 38, at 100–01 (arguing that the prosecution may "set itself up for reversal" if it successfully challenges for cause "a venire member who only felt that homosexuality was against God's law," because this arguably would in effect give the prosecution an additional peremptory challenge, but also recognizing that requiring a gay defendant to expend a peremptory challenge on a juror who expresses anti-gay bias may "prematurely exhaust[ ] a defendant's peremptory challenges").
[175] *Cf.* Taylor Flynn, *Clarion Call or False Alarm: Why Proposed Exemptions to Equal Marriage Statutes Return Us to a Religious Understanding of the Public Marketplace*, 5 Nw. J.L. & Soc. Pol'y 236, 248–49 (2010) (discussing the debate about whether anti-gay beliefs are like racism). *But see* Lockhart v. McCree, 476 U.S. 162, 176 (1986)

Court have noted that belief in the moral inferiority of a racial group could cause jurors to be "influenced" by their "less consciously held racial attitudes" during the capital sentencing process.[176] Jurors who express strong gay-negative beliefs should be removed from juries in cases involving LGBT issues and/or people, regardless of whether those attitudes are rooted in religious beliefs, and even if the venireperson asserts that she can be fair despite her beliefs.

However, this is one way in which the law addressing juror homophobia differs from the law governing racial bias at the present time. Given the current state of the law, prevailing social attitudes in many regions, and the fact that peremptory strikes are limited, litigants sometimes may be stuck with such "explicit-but-fair" homonegative jurors, and advocates may have to help educate these jurors about how to monitor their own anti-gay biases in deliberations.[177]

B. "Closet" Homonegativity:[178] *Voir Dire for Bias and Peremptory Challenges*

Many jurors will not admit to anti-gay biases, even though they may hold them,[179] and others may be unaware of such biases.[180] Social science provides particularly helpful insight into questions that are likely to uncover anti-gay bias. Some of these indirect strategies may prove more effective than attempts to question jurors directly about their attitudes toward gayness.[181]

("[T]hose who firmly believe that the death penalty is unjust may nevertheless serve as jurors in capital cases so long as they state clearly that they are willing to temporarily set aside their own beliefs in deference to the rule of law.").

[176] Turner v. Murray, 476 U.S. 28, 35 (1986) (plurality opinion) ("[A] juror who believes that blacks are violence prone or morally inferior might well be influenced by that belief in deciding whether petitioner's crime involved the aggravating factors specified under Virginia law. Such a juror might also be less favorably inclined toward petitioner's evidence of mental disturbance as a mitigating circumstance. More subtle, less consciously held racial attitudes could also influence a juror's decision in this case. Fear of blacks, which could easily be stirred up by the violent facts of petitioner's crime, might incline a juror to favor the death penalty.").

[177] *Cf.* Lee, *The Gay Panic Defense, supra* note 31, at 556 ("[E]ven prejudiced jurors can be encouraged to act in non-prejudiced ways. As discussed above, when non-prejudiced norms are made salient by the expression of positive opinions on gay-related issues, both low and high-prejudice subjects report less prejudiced opinions about gay men.").

[178] *Id.* at 561 (discussing the term "closet homophobe").

[179] *See* Clemens, *supra* note 38, at 97 (recognizing that "[p]otential jurors may not be entirely forthcoming about their anti-gay bias, particularly when questioned about anti-gay bias in front of other jurors," and suggesting that "[t]his problem can sometimes be rectified through individual, detailed questioning").

[180] *See* Crocker & Kovera, *supra* note 72, at 212 ("Some venirepersons may be unaware of their prejudices, as people often lack insight into the factors that influence their behavior." (citation omitted)).

[181] *But see* Kraus & Ragatz, *supra* note 39, at 255–56 (suggesting that attorney's attempt to gauge homophobia among prospective jurors by asking them directly, "In your

Research has identified a number of factors that predict gay-negative attitudes. Studies demonstrate a relationship between lack of contact with gays and lesbians and anti-gay attitudes.[182] Researchers attempting to gauge homonegativity have used questions such as, "Have you ever had any friends or relatives who are gay, lesbian, or bisexual . . . ?"[183] However, jury consultant Sean Overland cautions that, "While having a gay friend affects people's views on homosexuality, simply knowing someone who is gay, or having a gay relative, does not."[184]

Research also shows that people who believe that being gay is a choice tend to demonstrate more gay-negative attitudes.[185] Academics have asked subjects to rate their agreement with the statement, "I believe homosexuality is primarily a personal choice," using a six-point Likert scale ranging from "strongly disagree" to "strongly agree."[186]

Other important indicators of homonegative attitudes are political ideology[187] and religiosity,[188] although caveats regarding voir dire questions about religion follow in Part II.C.[189] Jurors who identify as "politically conservative" tend to have more anti-gay attitudes than politically liberal or moderate jurors.[190] Overland writes that "jurors who try to attend religious services every week tend to be more homophobic than jurors who do not," and that "[j]urors who report that their religious beliefs are 'often important' or 'always important' in guiding their daily decisions tend to be more homophobic than jurors for whom religious beliefs are only 'sometimes important' or 'never important' to their daily decisions."[191]

In her 2008 article, *The Gay Panic Defense*, Professor Cynthia Lee made a significant contribution in this area by drawing on implicit social cognition research to describe means of identifying anti-gay bias in voir dire, as well as techniques to help guard against the influence of implicit anti-gay

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opinion, should the sexual orientation of the defendant influence the treatment s/he receives in the legal system?" and "Do you have any biases or prejudices that might prevent you from judging this case fairly given that it involves a gay victim?" (internal quotation marks omitted)).

[182] *See* Jill M. Chonody, *Measuring Sexual Prejudice Against Gay Men and Lesbian Women: Development of the Sexual Prejudice Scale (SPS)*, 60 J. HOMOSEXUALITY 895, 900, 917 (2013).

[183] *Id.* at 905.

[184] Overland, *supra* note 33, at 4.

[185] Chonody, *supra* note 182, at 900, 917.

[186] *Id.* at 905.

[187] *See* Overland, *supra* note 33, at 4; Lee, *The Gay Panic Defense, supra* note 31, at 562 (discussing Drury Sherrod & Peter M. Nardi, *Homophobia in the Courtroom: An Assessment of Biases Against Gay Men and Lesbians in a Multiethnic Sample of Potential Jurors*, *in* STIGMA AND SEXUAL ORIENTATION: UNDERSTANDING PREJUDICE AGAINST LESBIANS, GAY MEN, AND BISEXUALS 24, 27 (Gregory M. Herek ed., 1998)).

[188] Overland, *supra* note 33, at 3.

[189] *See infra* Part II.C.

[190] Overland, *supra* note 33, at 4.

[191] *Id.* at 3.

bias in deliberations.[192] Lee discussed "proxy or surrogate" questions proposed by Drury Sherrod and Peter Nardi to uncover homophobia:

> Do you have any close friends who are gay or lesbian?
> Politically, are you liberal, middle-of-the-road, or conservative?
> How important are your religious beliefs in guiding your daily decisions?
> Do you think the world would be a better place if more people followed old-fashioned values?
> Do you try to attend religious services at your church or temple every week?
> Are federal and state governments doing enough to make sure industry does not pollute the environment we live in?
> How thoroughly do you read your local newspaper every day?
> Please tell me the postal ZIP code where you live.
> What is your current marital status?
> What is your religion?
> Have you ever served in the U.S. Armed Forces?
> Do you feel your life is more controlled by fate than by planning?
> Do you read any magazines on a regular basis?
> What is your highest level of education?[193]

Overland made similar suggestions in a 2009 article.[194] As a tactical matter, Overland cautioned that direct questions about attitudes toward same-sex marriage or gay civil rights might make gay-friendly jurors a target of peremptory challenges by opposing counsel.[195] He recommended limiting direct questions about attitudes toward LGBT issues to those that are relatively non-controversial, thereby exposing the jurors with strong anti-gay beliefs, while not "outing" potential allies.[196] Writing in 2009, Overland recommended the following questions:

> Would you feel bothered if a gay or lesbian couple moved in next door to you?

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[192] Lee, *The Gay Panic Defense*, *supra* note 31, at 562–63; *see also* Perkiss, *supra* note 16, at 820–23.

[193] Lee, *The Gay Panic Defense*, *supra* note 31, at 562–63.

[194] Overland, *supra* note 33, at 3–4.

[195] *Id.* at 3.

[196] *Id.* ("[A]ny juror who believes that gays and lesbians should have officially-recognized marriages, or who thinks that sexual orientation should be a civil right, becomes a target for a peremptory challenge by the opposition."). Of course, just a few years later, support for same-sex marriage is much more mainstream, at least in certain areas of the country. *See, e.g.*, Andrew R. Flores & Scott Barclay, The Williams Institute, Public Support for Marriage for Same-Sex Couples by State 3 (2013), *archived at* http://perma.cc/8E93-33HP (noting support for same-sex marriage as high as 62% in the District of Columbia). Questions about same-sex marriage might elicit favorable responses from a higher percentage of the jury pool, thus creating less of a danger of "outing" friendly jurors.

> Do you think employers should be able to refuse to hire someone because of his or her sexual orientation?
>
> Would you feel bothered if you had to work closely with someone who was gay or lesbian?[197]

Researchers have worked since at least the 1970s to develop scales to measure homophobia.[198] In 2013, Jill Chonody, an Australian professor, published a study validating a sexual prejudice scale.[199] Chonody's scale includes separate questions measuring negative attitudes toward gay men and lesbians.[200] Subjects are asked to rate their reactions to statements on the Likert scale.[201] Chonody's "sexual prejudice scale" includes statements measuring three sub-scales: (1) stereotyping (e.g., "[m]ost gay men are promiscuous" and "[m]ost lesbians prefer to dress like men"); (2) affective-valuation (e.g., "[i]t's wrong for men to have sex with men" and "[l]esbians are confused about their sexuality"); and (3) social equality beliefs (e.g., "[h]ealth care benefits should include partners of gay male employees" (reverse-scored) and "[l]esbians want too many rights").[202] Consistent with the relatively indirect methods described by Overland, questions measuring "social equality beliefs" from Chonody's "sexual prejudice scale" and similar instruments could be used to measure prospective jurors' anti-gay attitudes.

C. Potential Collision Course: Voir Dire on Religion

Social science cannot necessarily translate directly into the courtroom. Research demonstrates that religiosity is correlated with gay-negative attitudes,[203] and proxy questions such as, "What is your religion?" and "Do you try to attend religious services at your church or temple every week?"[204] may be effective in predicting anti-gay bias. However, some of these questions

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[197] *Id.* ("In an average jury venire, relatively few people (10 to 20%) will answer 'yes' to these questions. A 'yes' answer therefore gives valuable information about anti-gay attitudes, while a 'no' answer gives the opposition little usable information.").

[198] *See* Chonody, *supra* note 182, at 898 (discussing earlier measures of homophobia, including those addressed in Gregory M. Herek's 1984 study, *Attitudes Toward Lesbians and Gay Men: A Factor-Analytic Study*, 10 J. HOMOSEXUALITY 39).

[199] *Id.* at 895.

[200] *Id.* at 901.

[201] *Id.* at 902 (explaining that "[t]he forced-choice Likert scale" is commonly used for "measuring a socially undesirable attitude because respondents cannot avoid a difficult response by choosing a neutral option," suggesting that the format might be useful for juror questionnaires).

[202] *Id.* at 913.

[203] *Id.* at 900 ("[R]eligiosity has been shown to positively correlate with antigay bias." (citations omitted)).

[204] Lee, *The Gay Panic Defense*, *supra* note 31, at 562–63.

may not be appropriate for the courtroom, and may even invite legal challenges.[205]

The issue of whether the U.S. Constitution bars a litigant from exercising peremptory challenges based on a venire member's religious affiliation (as opposed to religious beliefs) is an open question.[206] In 1994, the U.S. Supreme Court denied certiorari in a case that presented this issue, over a dissent by Justices Thomas and Scalia.[207] Lower federal courts remain split,[208] and commentators continue to debate the topic.[209] Some states have prohibited the exercise of peremptory challenges based on religion[210]—including the "blue" states of Connecticut and Massachusetts.[211]

Challenges to peremptory strikes based on religious affiliation sometimes involve the protection of religious minorities, which can overlap with racial and ethnic groups that face discrimination.[212] As a result, some of the

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[205] *See* Hinkle, *supra* note 34, at 192 (discussing possible legal challenges that could follow if it appears that a lawyer has struck a juror based on the juror's religious affiliation).

[206] *See id.* at 141, 145–46 (describing how courts are split on the issue of religion-based peremptory challenges, and arguing that the "Constitution forbids the use of peremptory challenges based solely on . . . stereotypes about religions but that a juror's actual stated beliefs are a proper basis for exclusion even if those beliefs are religiously inspired"). The Jury Selection and Service Act of 1968, which seeks to ensure that jury venires for grand and petit juries reflect a randomly selected, fair cross section of the population, prohibits exclusion from jury service on account of religion. 28 U.S.C. §§ 1861, 1862, 1863 (2012) ("No citizen shall be excluded from service as a grand or petit juror in the district courts of the United States or in the Court of International Trade on account of race, color, religion, sex, national, origin, or economic status."); *see* Grech v. Wainwright, 492 F.2d 747, 749–50 (5th Cir. 1974) (concluding that excusing Jewish venirepersons because the trial began on Yom Kippur did not violate the Act).

[207] Davis v. Minnesota, 114 S. Ct. 2120, 2120–22 (1994) (Thomas, J., dissenting from denial of certiorari); *see* Hinkle, *supra* note 34, at 146 (pointing out that, in dissenting from the denial of certiorari in *Davis*, Justice Thomas argued that "religious-affiliation-based peremptories were unconstitutional," and that, in contrast, Justice Ginsburg, concurring in the denial, "seemed to suggest that peremptories based on religious affiliation were constitutional" (discussing *Davis*, 114 S. Ct. at 2120–22)).

[208] Hinkle, *supra* note 34, at 146 n.47 (citing federal court opinions split on the issue).

[209] *Id.* at 146–47.

[210] *See id.* at 146 n.48 (cataloguing state court decisions on each side of the split).

[211] State v. Hodge, 726 A.2d 531, 553–54 (Conn. 1999) (concluding "that the equal protection clause of the fourteenth amendment to the United States constitution prohibits the exercise of a peremptory challenge to excuse a venireperson because of his or her religious affiliation," but also that the peremptory challenge at issue in the case was not based on religious affiliation and that the prosecutor's questioning about the venireperson's membership in the Nation of Islam was to determine whether the prospective juror could follow the court's instructions); Commonwealth v. Carleton, 629 N.E.2d 321, 325 (Mass. App. Ct. 1994) ("The use of peremptory challenges to exclude prospective jurors solely because of bias presumed to derive from their membership in discrete community groups based on creed or national origin is prohibited by art. 12 of the Massachusetts Declaration of Rights." (citation omitted)); *see also infra* notes 289–93 (discussing Colorado, Oregon, and Minnesota juror nondiscrimination statutes that include religion as a protected category).

[212] *See* Hinkle, *supra* note 34, at 139, 172–73, 194 & n. 213 (discussing a prosecutor's peremptory strike of an African American juror that was justified on the basis that he looked like a Muslim, which was upheld by the D.C. Circuit). Hinkle writes, "The per-

proxy questions designed by Sherrod and Nardi and offered by Lee to ferret out LGBT bias are on a potential collision course with other protected categories. Social science and statistics might suggest it is strategically prudent to remove jurors who are members of religious denominations that are not LGBT-inclusive. However, challenges based on religious identity alone may run afoul of constitutional or other state law protections.

To be clear, the proxy questions that may raise red flags focus on religious *affiliation*, not religious *belief*. As Daniel Hinkle has succinctly explained, "a person's beliefs can be taken into account in determining his fitness to serve on a jury, regardless of whether those beliefs are grounded in a religion," because "jury service is an unusual situation in which a person's opinions and beliefs are legitimately relevant to his relationship with the government."[213] For that reason, the Sherrod and Nardi proxy question, "How important are your religious beliefs in guiding your daily decisions?"[214] may in fact be an appropriate voir dire question in some circumstances. For example, if a juror has offered that she disapproves of same-sex sexuality based on the teachings of her church (as many did in the *Jenkins* case), it is perfectly appropriate to probe whether she can put those beliefs aside in judging the facts of the case.[215]

This tension reflects a broader clash of worldviews that is particularly evident in the debate over marriage equality.[216] While many advocates and commentators believe we are witnessing a new civil rights movement that reflects a "sea change" in public attitudes toward LGBT sexuality,[217] others warn of an attack on religious freedom.[218] These are themes that have played

centage of cases reviewing peremptory challenges based on religious affiliation that originated when the prosecutor was accused of basing his peremptory on race and responded by stating that religion was the reason is strikingly high." *Id.* at 169 (footnote omitted).

[213] *Id.* at 148–49. Hinkle discusses court cases and concludes that, "peremptories based on an actual stated religious belief, like any other belief, do not violate *Batson*." *Id.* at 185–87.

[214] Lee, *The Gay Panic Defense*, *supra* note 31, at 563.

[215] *See* Hinkle, *supra* note 34, at 148–49, 185.

[216] *See* Chai R. Feldblum, *Moral Conflict and Conflicting Liberties*, *in* SAME-SEX MARRIAGE AND RELIGIOUS LIBERTY: EMERGING CONFLICTS 123, 123–25 (Douglas Laycock, Anthony R. Picarello, Jr. & Robin Fretwell Wilson eds., 2008); Douglas NeJaime, *Marriage Inequality: Same-Sex Relationships, Religious Exemptions, and the Production of Sexual Orientation Discrimination*, 100 CALIF. L. REV. 1169, 1180 (2012) ("Debates over marriage for same-sex couples increasingly focus on religious liberty issues.").

[217] This debate occurred in a condensed form during an exchange that Roberta Kaplan, the lawyer for plaintiff-respondent Edith Windsor in the challenge to the Defense of Marriage Act (DOMA), had with Chief Justice Roberts and Justice Scalia regarding Congress' intent in passing DOMA in 1996. Transcript of Oral Argument at 2, 105–06, United States v. Windsor, 133 S. Ct. 2675 (2013) (No. 12-307) [hereinafter *Windsor* Transcript of Oral Argument]. Justice Scalia expressed skepticism, asking whether "there has been this sea change between now and 1996," and Ms. Kaplan responded, "I think with respect to the understanding of gay people and their relationships there has been a sea change, Your Honor." *Id.* at 106.

[218] *Compare* NeJaime, *supra* note 216, at 1172–80 (discussing and critiquing so-called "marriage conscience protection" provisions proposed by religious liberty scholars

out in debates about photographers, florists, and wedding cakes.[219] They could surface in jury selection as well, an arena in which venirepersons are summoned to appear and answer questions, where the competing constitutional interests are even weightier, and where much is at stake for litigants.

On this shifting terrain, for litigants or advocates who view themselves as part of an LGBT rights movement, voir dire questions that focus on religious affiliation (as opposed to religious beliefs) arguably carry a heavy cost. Striking jurors based on religious affiliation potentially could entrench divisions and contribute to people of faith feeling marginalized,[220] whether legitimate or not, which may prove unhelpful to the LGBT rights movement. Questions about religious affiliation also arguably reinforce a false dichotomy between LGBT equality and faith,[221] and contribute to inaccurate generalizations about people with a tie to a major world religion.[222] Moreover,

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in the marriage equality debate), *with* Richard W. Garnett, *Worth Worrying About: Same-Sex Marriage & Religious Freedom*, COMMONWEAL (Aug. 5, 2013), https://www.commonwealmagazine.org/worth-worrying-about&sa=D&usg=ALhdy2-CKGGG1idPLKDkDajISRZqZot2Sw, *archived at* http://perma.cc/7KZH-ZGYN (arguing that "the dangers posed by the legal redefinition of marriage are real").

[219] *See, e.g.*, Elane Photography v. Willock, 309 P.3d 53, 77 (N.M. 2013) (concluding that a photographer's refusal to photograph a same-sex commitment ceremony constitutes sexual-orientation discrimination in violation of the New Mexico Human Rights Act); *Oregon Bakery Owner Aaron Klein Denies Lesbian Couple a Wedding Cake*, HUFFINGTON POST (Feb. 5, 2013), http://www.huffingtonpost.com/2013/02/04/aaron-klein-oregon-bakery-owner-lesbian-wedding-cake_n_2615563.html, *archived at* http://perma.cc/JT84-THVM; Allison Terry, *Florist Sued Again for Refusing to Provide Flowers for Gay Wedding,* CHRISTIAN SCIENCE MONITOR, (Apr. 19, 2013), http://www.csmonitor.com/USA/USA-Update/2013/0419/Florist-sued-again-for-refusing-to-provide-flowers-for-gay-wedding, *archived at* http://perma.cc/6ZQJ-UGKY.

[220] NeJaime cites a *Wall Street Journal* piece written by Professor Mary Ann Glendon as one example of this rhetoric: "Every person and every religion that disagrees [with same-sex marriage] will be labeled as bigoted and openly discriminated against." NeJaime, *supra* note 216, at 1182 (quoting Mary Ann Glendon, *For Better or for Worse?*, WALL ST. J., Feb. 25, 2004, at A14); *see also* Flynn, *supra* note 175, at 240 (discussing claims of marginalization or victimization by religious opponents of gay rights).

[221] *See generally* JAY MICHAELSON, GOD VS. GAY?: THE RELIGIOUS CASE FOR EQUALITY (2011) (making religious arguments for LGBT equality); *Faith*, NAT'L GAY & LESBIAN TASK FORCE, http://www.thetaskforce.org/issues/faith (last visited Feb. 2, 2014), *archived at* http://perma.cc/3B8B-CZRG (discussing how to build welcoming religious congregations and amplify "the voices of faith leaders to counter religiously-based bigotry"); Flynn, *supra* note 175, at 237 ("[The] common presentation of the issue [as "Gay Rights versus Religious Freedom"] ignores that many religious faiths support same-sex marriage as a matter of theology, that many gay people are members of religious faiths, and that many of us are strong supporters of religious liberty."). One supporter of the Minnesota same-sex marriage law emphasized the presence of LGBT people in faith communities as an important ingredient in the movement for legal equality: "It was only a matter of time before people would realize that we're just folks—*we're in people's congregations*, we're in the grocery stores, we're everywhere." Monica Davey, *Minnesota Senate Clears Way for Same-Sex Marriage*, N.Y. TIMES (May 13, 2013), http://www.nytimes.com/2013/11/06/us/illinois-sends-bill-allowing-gay-marriage-to-governor.html&sa=D&usg=ALhdy2-9l8mZXV1CYgA20Q8OPtkgWWZ3Jg, *archived at* http://perma.cc/6GTX-EFQW (emphasis added).

[222] *See* Frank Bruni, Op-Ed., *Religion Beyond the Right*, N.Y. TIMES (May 6, 2013), http://www.nytimes.com/2013/05/07/opinion/bruni-religion-beyond-the-right.html, *archived at* http://perma.cc/7TJF-FSZD ("We refer incessantly in this country to the 're-

such questions could alienate potential allies.[223] Although a lawyer might be able to make statistical predictions about a venireperson's beliefs based on religious affiliation, such questions could run the risk of reifying stereotypes at a time when attitudes are rapidly changing.[224] While the Vatican might still oppose same-sex marriage, and gays who marry continue to be fired from Catholic institutions,[225] recent polling demonstrates that more than half of American Catholics support same-sex marriage, a higher rate than the rate that exists in the general voting population.[226] Over half of more devout Catholics—those who attend religious services about once every week—also support same-sex marriage.[227]

Instead of focusing on religious affiliation, litigants might instead focus on other "proxy" areas, such as asking jurors about their attitudes toward traditional institutions and roles. For example, Sherrod and Nardi suggest the question, "Do you think the world would be a better place if more people followed old-fashioned values?"[228] Other relatively non-controversial Sherrod and Nardi proxy questions are: "Politically, are you liberal, middle-of-the-road, or conservative?" and "Do you read any magazines on a regular basis?"[229]

Another tack is to focus more on jurors' level of contact with gays and lesbians,[230] by posing a variant of the Sherrod and Nardi question, "Do you have any close friends who are gay or lesbian?"[231] Recent examples demon-

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ligious right,' a phrase routinely presented as if it's some sort of syllogism . . . . But there's a religious center. A religious left. There are Christian moderates and Christian liberals: less alliterative and less dogmatic, but perhaps no less concerned with acting in ways that reflect moral ideals. We should better acknowledge that and them.").

[223] *See* Hinkle, *supra* note 34, at 176 ("[A] Catholic might be injured by the assumption that she is pro-life because she is offended by the notion that all Catholics think alike, even on topics for which the Catholic Church has an official position.").

[224] *See, e.g.*, *Second High-Profile Methodist Minister Charged with Officiating Gay Son's Wedding*, N.Y. Daily News (Jan. 17, 2014), http://www.nydailynews.com/news/national/high-profile-methodist-minister-charged-officiating-gay-son-wedding-article-1.1583351, *archived at* http://perma.cc/HXY6-LB6M (describing how Methodist ministers are being charged with officiating at same-sex marriages, which violates church policy); Kyle Spencer, *A Rainbow over Catholic Colleges: How Georgetown Became a Gay-Friendly Campus*, N.Y. Times (July 30, 2013), http://www.nytimes.com/2013/08/04/education/edlife/how-georgetown-became-a-gay-friendly-campus.html, *archived at* http://perma.cc/4YBC-SLA3 (describing increasingly gay-friendly campus life at Georgetown).

[225] Michael Paulson, *Gay Marriages Confront Catholic School Rules*, N.Y. Times (Jan. 22, 2014), http://www.nytimes.com/2014/01/23/us/gay-marriages-confront-catholic-school-rules.html, *archived at* http://perma.cc/VJ3T-5KRJ.

[226] Press Release, Quinnipiac University Polling Institute, U.S. Catholics Back Pope on Changing Church Focus, Quinnipiac University National Poll Finds; Catholics Support Gay Marriage, Women Priests 2-1 (Oct. 4, 2013) (finding that 60% of American Catholics support same-sex marriage, compared with 56% of the voting public), *archived at* http://perma.cc/M67B-7FCA.

[227] *Id.* (finding that 53% of Catholics who attend religious services about once every week support same-sex marriage).

[228] Lee, *The Gay Panic Defense*, *supra* note 31, at 563.

[229] *Id.* at 562–63.

[230] *See* Chonody, *supra* note 182, at 900, 905.

[231] Lee, *The Gay Panic Defense*, *supra* note 31, at 562.

strate that this is an area in which the social science tracks popular wisdom. As Senator Rob Portman's story illustrates, having a close friend or relative who is gay can affect even an avowed conservative's views on gay rights.[232] Edith Windsor (the plaintiff-respondent in the DOMA case) said of the Senator's about-face, "That's how everybody who's not gay decides to support gay marriage. They discover that somebody they know and love is gay, and they say, 'Oh, Jesus, I had no idea.' "[233] In social science terms, this phenomenon is described as "expos[ure] . . . to countertypical associations."[234]

Vexingly, this Sherrod and Nardi proxy question also illustrates how voir dire designed to surface anti-gay bias also runs the risk of "outing" prospective LGBT jurors or their friends and family members,[235] raising the concerns identified in Part III.[236] The Sherrod and Nardi question stops short of inquiring about the prospective juror's own sexual history. Nonetheless, it might increase the pressure on gay venirepersons to "come out" in voir dire, demonstrating the interrelated aspects of these issues.

D. Surfacing Bias: An Effective Strategy

At least in the near future and in certain jurisdictions, some "explicit-but-fair" and "closet" homophobes may remain on a jury,[237] and research confirms that all of us harbor implicit bias.[238] For these reasons, the techniques suggested by Lee and others for helping jurors monitor and reduce the influence of anti-gay and anti-trans bias become all the more important. Commentators agree that a bedrock principle in eliminating bias in the courtroom is to "[f]oreground social categories" in order to encourage jurors "to

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[232] *See* Rob Portman, Op-Ed., *Gay Couples Also Deserve Chance to Get Married*, Columbus Dispatch (Mar. 15, 2013), http://www.dispatch.com/content/stories/editorials/2013/03/15/gay-couples-also-deserve-chance-to-get-married.html, *archived at* http://perma.cc/YV93-6KAQ.

[233] Andrew Goldman, *Edith Windsor Takes Back What She Said About Topless Gay Activists*, N.Y. Times Mag. (May 3, 2013), http://www.nytimes.com/2013/05/05/magazine/edith-windsor-takes-back-what-she-said-about-topless-gay-activists.html, *archived at* http://perma.cc/X5NG-GF2C.

[234] Kang et al., *Implicit Bias in the Courtroom*, *supra* note 126, at 1169–70 ("[I]f we have a negative attitude toward some group, we need exposure to members of that group to whom we would have a positive attitude. . . . These exposures can come through direct contact with countertypical people.").

[235] For example, during voir dire in the *Jenkins* case, a juror hesitated when asked about her opinion about the federal hate crime statute, and started to say something about her family members before breaking off. *Jenkins* Transcript of Record, *supra* note 79, at 165–66. Defense counsel asked, "[W]as the hesitation about using the word 'gay,' or was it a hesitation because you're just unsure about whether or not a family member might be?" The juror responded, "Well, I guess because they're young right now; they don't understand what's going on, but I had to think about his question to make sure I answered it honestly." *Id.* at 168.

[236] *See infra* Part III.

[237] Lee, *The Gay Panic Defense*, *supra* note 31, at 561–62 (using the terms "explicit" and "closet" homophobe).

[238] Kang et al., *Implicit Bias in the Courtroom*, *supra* note 126, at 1128–35 (discussing research on implicit biases).

be conscious of race, gender, and other social categories" and to talk about how those categories may be influencing their decision-making.[239] As Lee explains, "Social science research suggests that the use of mental imagery can help reduce implicit bias in all individuals and that the first step to overcoming implicit bias is awareness."[240] For example, Lee suggests "gender and sexual orientation switching" exercises,[241] a technique also advocated by Bennett Capers,[242] Alafair S. Burke,[243] and others.[244] In these exercises, the jurors are asked to imagine the same scenario as in the case, but with the genders or sexual orientations of the actors switched, and to self-monitor whether they perceive the situation differently.[245] These role-reversals could be presented in opening statements and closing arguments, or given as a jury instruction.[246]

Other commentators suggest juror education on implicit bias[247] and the use of special instructions.[248] Prosecutors, judges, and appointed counsel also may benefit from education on the effects of cognitive bias.[249] Judge Mark W. Bennett, a district court judge in the Northern District of Iowa,[250] instructs jurors on implicit bias, including prior to opening statements, urging them "to evaluate the evidence carefully and to resist jumping to conclu-

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[239] *Id.* at 1184; *see also* Lee, *Making Race Salient*, *supra* note 49, at 1586–1601 (discussing strategies based on social science for making race salient throughout a trial).

[240] Lee, *The Gay Panic Defense*, *supra* note 31, at 565.

[241] *Id.* at 564.

[242] Capers, *supra* note 18, at 1299–1300 ("[I]magining what decision would be appropriate for a female victim can aid decision makers in confronting and overriding implicit biases they may have when dealing with a male victim.").

[243] Alafair S. Burke, *Prosecutors and Peremptories*, 97 IOWA L. REV. 1467, 1484–85 (advocating that prosecutors utilize "switching" exercises to become more aware of and attempt to neutralize their own implicit cognitive bias in jury selection).

[244] Kang et al., *Implicit Bias in the Courtroom*, *supra* note 126, at 1185 (advocating that jurors "[e]ngage in perspective shifting" by "shifting perspectives into the position of the outgroup party, either plaintiff or defendant").

[245] Lee, *The Gay Panic Defense*, *supra* note 31, at 564.

[246] *Id.* at 564–65.

[247] *See* Dale Larson, *A Fair and Implicitly Impartial Jury: An Argument for Administering the Implicit Association Test During Voir Dire*, 3 DEPAUL J. SOC. JUST. 139, 166–69 (2010) (arguing that jurors should take the Implicit Association Test (IAT) in part to help them gain self-awareness of their implicit biases, which in turn could enable them to overcome the negative effects of those biases); Roberts, *supra* note 126, at 831–32 (evaluating proposals to use the IAT to educate jurors about their implicit biases).

[248] *See* Judge Mark W. Bennett, *Unraveling the Gordian Knot of Implicit Bias in Jury Selection: The Problems of Judge-Dominated Voir Dire, the Failed Promise of* Batson*, and Proposed Solutions*, 4 HARV. L. & POL'Y REV. 149, 169 (2010).

[249] *E.g.*, Burke, *supra* note 243, at 1483–84 ("One method of improving prosecutorial neutrality during jury selection would be to train prosecutors about the prevalence of unconscious stereotypes, types of cognitive biases, and the potential distorting effects of stereotypes and biases on prosecutorial decision making, including neutral jury selection. Some psychological research suggests that self-awareness of cognitive limitations can improve the quality of individual decision making.").

[250] The Honorable Judge Mark W. Bennett Biography, *Judges Information*, UNITED STATES DISTRICT COURT, NORTHERN DISTRICT OF IOWA, http://www.iand.uscourts.gov/eweb/home.nsf/65944fcb56773c56862573a30055c4f3/17a5762715fa4c52862573c90079072c?OpenDocument (last visited Mar. 9, 2014), *archived at* http://perma.cc/JZ72-LAGL.

sions based on personal likes or dislikes, generalizations, gut feelings, prejudices, sympathies, stereotypes, or biases."[251] Addressing similar concerns, the American Bar Association recently passed a resolution calling for state and other governments to take legislative action that would require courts in any criminal trial, upon the request of a party, to give an instruction to the jury that it shall not let bias based on sexual orientation or gender identity influence its decision.[252]

Judge Bennett writes that many of his colleagues resist his suggested reforms, "fearing that implicit biases will only be exacerbated if we call attention to them."[253] As scholars of implicit social cognition and legal commentators have pointed out, the solution is not to pretend that we live in a post-*Will and Grace* world in which we have conquered homophobia, but rather to identify appeals to bias and confront them directly.[254] Research suggests that if even a single juror voices "non-prejudiced norms" during deliberations, those statements can affect jury deliberations.[255] The hope is that—as time passes—appeals to anti-gay and anti-trans bias will be rejected by jurors and will fade from litigation.

III. Interrelated Issues: Protecting LGBT Jurors

In a comment in the *UCLA Law Review* in 1998, Paul Lynd recognized an "expanding universe of cases with sexual orientation as a relevant [voir dire] subject," including hate crimes prosecutions.[256] Because disclosures in voir dire become part of the public record,[257] Lynd wrote that, "The pressure to conceal gay or lesbian sexual orientation would be particularly strong in states where gay and lesbian sexual conduct remains illegal and in the majority of states where employment discrimination based on sexual orientation remains legal."[258]

Sixteen years later, the dynamics of the courtroom may be different at least in some jurisdictions. *Lawrence v. Texas* has reduced criminal stigma,[259] and more states protect LGBT citizens with anti-discrimination

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[251] Kang et al., *Implicit Bias in the Courtroom*, *supra* note 126, at 1182–83.

[252] Am. Bar Ass'n, Res. 113A (2013), *archived at* http://perma.cc/ZJ4M-FH73 (urging state governments to take legislative action to curtain the "availability and effectiveness of the 'gay panic' and 'trans panic' defenses in part by "[r]equiring courts in any criminal trial or proceeding, upon the request of a party, to instruct the jury not to let bias, sympathy, prejudice, or public opinion influence its decision about the victims, witnesses, or defendants based upon sexual orientation or gender identity").

[253] Bennett, *supra* note 248, at 169.

[254] *E.g.*, Kang et al., *Implicit Bias in the Courtroom*, *supra* note 126, at 1184–85.

[255] Lee, *The Gay Panic Defense*, *supra* note 31, at 554.

[256] Lynd, *supra* note 3, at 236–37.

[257] *Id.* at 268.

[258] *Id.* at 269.

[259] 539 U.S. 558, 578 (2003); *cf. Developments in the Law—Sexual Orientation and the Law*, *supra* note 55, at 1519–37 (discussing the criminalization of same-sex sexual activity through sodomy statutes and the stigma they created prior to the invalidation of

statutes.[260] In the increasing number of jurisdictions recognizing same-sex marriage,[261] the mention of a same-sex spouse in voir dire may become increasingly normalized, even routine.[262] However, like all LGBT issues, the risk associated with "outing" prospective jurors in voir dire is highly contextual and localized.[263]

For these reasons, and others that may be more individualized, prospective jurors who identify as LGBT may continue to feel anxiety in voir dire.[264] LGBT identity often is not readily apparent,[265] and it is difficult to imagine

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Bowers v. Hardwick, 478 U.S. 186 (1986)). *But see* J. Kelly Strader, Lawrence's *Criminal Law*, 16 BERKELEY J. CRIM. L. 41, 77–106 (2011) (arguing that even after *Lawrence*, courts continue to use a "heterosexual paradigm" to uphold laws criminalizing sexual activity other than vaginal intercourse).

[260] *See* HUMAN RIGHTS CAMPAIGN, EQUALITY FROM STATE TO STATE 2013: A REVIEW OF STATE LEGISLATION AFFECTING THE LESBIAN, GAY, BISEXUAL AND TRANSGENDER COMMUNITY AND A LOOK AHEAD IN 2014 12 (2013), *archived at* http://perma.cc/6USA-SNVQ (reporting that seventeen states and the District of Columbia prohibit discrimination based on sexual orientation and gender identity and that four states prohibit discrimination based on sexual orientation only).

[261] *See* Erik Eckholm, *Push Expands for Legalizing Same-Sex Marriage*, N.Y. TIMES (Nov. 12, 2012), http://www.nytimes.com/2012/11/13/us/advocates-of-gay-marriage-extend-their-campaign.html?_r=0, *archived* at http://perma.cc/K24V-RP8Q (describing victories in the November 2012 elections, which increased the total number of states recognizing same-sex marriage to nine plus the District of Columbia).

[262] Brower describes how increased "visibility and normalization of minority sexuality," as well as "growing acceptance of civil partnerships or marriage for same-sex couples and increasing numbers of same-sex families rearing children," may result in younger prospective LGBT jurors "anticipat[ing] that voir dire, jury service, and other associated processes will describe and reflect their relationships accurately." Brower, *Treatment of Lesbians and Gay Men in Jury Service*, *supra* note 19, at 700–01. He also writes that, as more jurisdictions recognize same-sex couples' relationships through marriage or other legal arrangements, "those couples' relationships take on a different societal and legal character, which should be recognized on voir dire and during jury service." *Id.* at 693.

[263] *See* Vanessa H. Eisemann, *Striking a Balance of Fairness: Sexual Orientation and Voir Dire*, 13 YALE J.L. & FEMINISM 1, 23 (2001) ("Consider a closeted gay, lesbian, or bisexual person living in a rural environment with a small population. Being forced to admit that [sic] his or her sexual orientation in a closed hearing could subject that person to a host of negative consequences. Even having to admit that she or he is a member of an organization that advocates gay rights or that she or he has contributed money to a gay rights organization may incite suspicion. In a sparsely populated area where venire members, attorneys, and the judge may know each other, the local newspapers would not be needed for such information to quickly become public."); *cf.* Kirk Johnson, *Gay Couples Face a Mixed Geography of Marriage*, N.Y. TIMES (Feb. 26, 2013), http://www.nytimes.com/2013/02/27/us/state-laws-on-gay-marriage-lead-to-disparities.html, *archived at* http://perma.cc/TK95-REY4 (describing stark differences in rights that exist for same-sex couples in Washington and Idaho, states that share a border).

[264] *See* Brower, *Treatment of Lesbians and Gay Men in Jury Service*, *supra* note 19, at 682–83 ("[G]ay persons must deliberately decide what to say or do and how much to disclose or allow to remain unspoken."); *see also* Todd Brower, *Multistable Figures: Sexual Orientation Visibility and Its Effects on the Experiences of Sexual Minorities in the Courts*, 27 PACE L. REV. 141, 177, 197–98 (2007); Todd Brower, *Obstacle Courts: Results of Two Studies on Sexual Orientation Fairness in the California Courts*, 11 AM. U. J. GENDER SOC. POL'Y & L. 39, 53–61 (2002).

[265] Brower, *Treatment of Lesbians and Gay Men in Jury Service*, *supra* note 19, at 680 ("Most sexual minorities are not identifiable visually, by accent, or surname.").

circumstances in which it would be appropriate for the court or advocates to inquire about venirepersons' sexual orientation directly.[266] However, LGBT identity may be disclosed by jurors in response to questioning.[267] Commentators have noted that even routine voir dire questions about personal and domestic relationships might cause awkwardness, either because these questions fail to account for same-sex relationships, or because they "out" LGBT jurors in hostile settings.[268] Updated questionnaires and courtroom practices can alleviate those problems significantly.[269] Nonetheless, inquiries focusing on attitudes toward LGBT issues as opposed to identity—the kinds of questions discussed in Parts I and II of this paper[270]—also might "out" gay jurors.[271]

In *The Gay Panic Defense*, Lee wrote that, although attitudes about same-sex sexuality might vary greatly across regions, she preferred not to propose rules about gay panic defenses that varied based on the jurisdiction.[272] Unlike the type of law reform discussed in Lee's article, jury voir dire is an inherently localized enterprise. In addition to having local rules about voir dire itself,[273] jurisdictions have different prevailing attitudes toward

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[266] *See id.* at 680–88 (describing how LGBT jurors report feeling like they are compelled to "come out" in voir dire, and that some state that advocates asked them directly about their sexual orientation in open court; arguing that such voir dire practices rob jurors of the choice to reveal their sexual orientation); *cf.* Russell K. Robinson, *Masculinity as Prison: Sexual Identity, Race, and Incarceration*, 99 CALIF. L. REV. 1309, 1312, 1383–90 (2011) (arguing that the requirement that inmates must "come out" as gay during the initial intake process and prove their gay identity to deputies to qualify for admission to the Los Angeles County Jail gay-dedicated K6G unit violates the constitutional right to privacy and forces important decisions that should be left to the individual).

[267] *See* Lynd, *supra* note 3, at 243–47 (noting that strikes against LGBT jurors are more difficult because "lesbians and gay men are not readily identifiable," but also describing how defense counsel in the Dan White trial, although prohibited from questioning jurors directly about their sexual orientation, questioned jurors "indirectly," using queries like, "Have you supported controversial causes, say homosexual rights, for instance?").

[268] *See* Brower, *Treatment of Lesbians and Gay Men in Jury Service*, *supra* note 19, at 686, 689, 691. Brower notes that, "Standard voir dire questions on marital status may render minority sexual orientation so invisible during jury service that often lawyers and judges do not even realize how those questions affect the venire panel and the court, or how inattentive traditional inquiries are to the diversity of lesbian and gay court users' lives." *Id.* at 689. He also describes how "many persons remain hidden [due to] fear of negative consequences after disclosing their sexuality," such as discrimination. *Id.* at 685.

[269] *See* JUDICIAL COUNCIL OF CAL., CALIFORNIA JURY QUESTIONNAIRE FOR CIVIL CASES (2004), *archived at* http://perma.cc/US72-HLSP (defining "significant personal relationship" as "a former spouse, domestic partner, life partner, or anyone with whom you have an influential or intimate relationship that you would characterize as important," and stating that jurors may indicate if they would prefer not to discuss something in open court); *see also* State v. Abernathy, 715 S.E.2d 48, 55 (Ga. 2011) (concluding that the trial court's individual voir dire of jurors regarding attitudes toward homosexuality in a separate conference room did not violate the defendant's right to a public trial).

[270] *See supra* Parts I, II.

[271] *See* Lynd, *supra* note 3, at 246–47.

[272] Lee, *The Gay Panic Defense*, *supra* note 31, at 555.

[273] *See* Comiskey, *supra* note 54, at 742.

same-sex marriage issues[274] and uneven levels of anti-discrimination protection for LGBT people.[275] Voir dire for anti-gay bias may be more important in some regions than others. Questions that may be perfectly safe for LGBT venirepersons in New England may make LGBT jurors uncomfortable in other parts of the country. Because this is such a culturally contested area, local context remains key to effective voir dire.

In 2014, it may seem non-controversial that LGBT identity alone should not constitute grounds for a challenge for cause (although jury discrimination in the exercise of peremptory challenges based on sexual orientation remains legal in many jurisdictions[276] and supporters of Proposition 8 did argue unsuccessfully that former U.S. District Court for the Northern District of California Chief Judge Vaughn Walker should have recused himself based on his sexual orientation[277]). Only a few decades ago, LGBT jurors were even more vulnerable to challenges. In his 1998 comment, Lynd discussed several notorious cases in which LGBT venirepersons were removed on the basis of sexual orientation alone,[278] including most famously in Dan White's 1979 trial for the killing of Harvey Milk, the first openly gay member of the San Francisco Board of Supervisors.[279]

Lynd also chronicles, however, the New York City Criminal Court decision the following year in *People v. Viggiani*, in which Judge S. Herman Klarsfeld refused to permit a gay juror to be removed for cause in a case in which the defendant was charged with gay-bashing.[280] Judge Klarsfeld wrote, "To say that this entire group of citizens who may be otherwise qualified, would be unable to sit as impartial jurors in this case, merely because of their homosexuality is tantamount to a denial of equal protection under the U.S. Constitution."[281] Judge Klarsfeld's opinion tells us, "The prospective juror disclosed in open court that he socialized and worked with homosexuals and out of the presence of other prospective jurors, he stated that he had homosexual experiences."[282] The tone of the exchange in *Viggiani* seems

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[274] *See* FLORES & BARCLAY, *supra* note 196, at 3 (concluding that, in 2012, a 31% difference existed between the jurisdiction with the lowest level of support of same-sex marriage and the highest level; support of same-sex marriage ranged from a high of 62% in the District of Columbia—closely followed by 57% in Massachusetts and Connecticut—to a low of 31% in Louisiana and Arkansas).

[275] *See* HUMAN RIGHTS CAMPAIGN, STATEWIDE EMPLOYMENT LAWS AND POLICIES, *supra* note 25.

[276] Birkey, *supra* note 29.

[277] Perry v. Brown, 671 F.3d 1052, 1095–96 (9th Cir. 2012) ("Chief Judge Walker had no obligation to recuse himself . . . or to disclose any potential conflict . . . . [T]he fact that a judge 'could be affected by the outcome of a proceeding[,] in the same way that other members of the general public would be affected, is not a basis for either recusal or disqualification . . . .'" (second bracket in original) (citations omitted)).

[278] *E.g.*, Lynd, *supra* note 3, at 251–53.

[279] *Id.* at 232, 246–47.

[280] 431 N.Y.S.2d 979, 982 (N.Y. Crim. Ct. 1980); Lynd, *supra* note 3, at 273–74.

[281] *Viggiani*, 431 N.Y.S.2d at 982.

[282] *Id.* at 980.

light years away from a world in which same-sex wedding announcements appear virtually every Sunday in the *New York Times*.

Peremptory challenges against LGBT jurors remain legal in most U.S. jurisdictions,[283] although they are now the target of critical commentary,[284] litigation challenges,[285] and legislative reform efforts.[286] At the writing of this paper, however, California bars peremptory challenges based on sexual orientation,[287] and the Ninth Circuit has issued a panel decision forbidding dis-

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[283] Birkey, *supra* note 29.

[284] *See, e.g.*, Kathryn Ann Barry, *Striking Back Against Homophobia: Prohibiting Peremptory Strikes Based on Sexual Orientation*, 16 BERKELEY WOMEN'S L.J. 157, 157–58 (2001) ("In order to achieve justice, the legal system must prevent attorneys from using inappropriate characteristics, such as sexual orientation, to exclude members of sexual minorities from juries."); Eisemann, *supra* note 263, at 26 ("Sexual orientation should be treated like race, religion, ethnicity, and gender for the purposes of voir dire."); John J. Neal, *Striking* Batson *Gold at the End of the Rainbow?: Revisiting* Batson v. Kentucky *and Its Progeny in Light of* Romer v. Evans *and* Lawrence v. Texas, 91 IOWA L. REV. 1091, 1094–95, 1113–15 (2006) (arguing that the use of peremptory challenges against gay and lesbian jurors on the basis of their sexual orientation violates equal protection and due process, as well as privacy interests).

[285] *E.g.,* SmithKline Beecham Corp. v. Abbott Labs., 740 F.3d 471, 474 (9th Cir. 2014) (holding that "equal protection prohibits peremptory strikes based on sexual orientation").

[286] Proposed federal legislation "to prohibit the exclusion of individuals from service on a Federal jury on account of sexual orientation or gender identity"—the Jury ACCESS Act and the Juror Non-Discrimination Act of 2013—was introduced in Congress in 2012 and 2013. Jury ACCESS Act, S. 3618, 113th Cong. (2012); Juror Non-Discrimination Act, H.R. 312, 113th Cong. (2013). So far the bills have not left committee. *See S. 38: Jury ACCESS Act*, GOVTRACK.US, http://www.govtrack.us/congress/bills/113/s38#overview (last visited Mar. 11, 2014), *archived at* http://perma.cc/9DMS-6YUK; *H.R. 312: Juror Non-Discrimination Act of 2013*, GOVTRACK, https://www.govtrack.us/congress/bills/113/hr312 (last visited Mar. 11, 2014), *archived at* http://perma.cc/BKD8-ZDSE. The Department of Justice currently forbids its attorneys from exercising peremptory strikes based on sexual orientation. *See* Supplemental Brief of Plaintiff-Appellee and Cross-Appellant SmithKline Beecham Corp. Opposing Rehearing En Banc, SmithKline Beecham Corp. v. Abbott Labs., Nos. 11-17357, 11-17373 (9th Cir. Apr. 17, 2014), http://cdn.ca9.uscourts.gov/datastore/general/2014/04/17/11-17357%20Smithkline%20Supp%20Brief.pdf, *archived at* http://perma.cc/HSB9-HSWP.

[287] In California, discrimination in jury selection was first prohibited through case law, and then by statutory amendment. *See* People v. Garcia, 77 Cal. App. 4th 1269, 1280–81 (Cal. Ct. App. 2000) (concluding that gays and lesbians "cannot be discriminated against in jury selection" and reasoning, "No one should be 'outed' in order to take part in the civic enterprise which is jury duty. . . . That being the case, no one should be allowed to inquire about it."); CAL. CIV. PROC. CODE § 231.5 (West 2006) ("A party may not use a peremptory challenge to remove a prospective juror on the basis of an assumption that the prospective juror is biased merely because of his or her race, color, religion, sex, national origin, sexual orientation, or similar grounds."); *see also* Johnson v. Campbell, 92 F.3d 951, 951 (9th Cir. 1996) (assuming without deciding that sexual orientation is a protected category under Batson v. Kentucky, 476 U.S. 79 (1986)); Williams v. Harrington, No. CV 09-08774 R(SS), 2011 WL 4055773, at *7–9 (C.D. Cal. Aug. 10, 2011) (concluding that the state court's denial of a *Batson/Wheeler* violation arising from peremptory strikes allegedly based on sexual orientation was not unreasonable; assuming a federal constitutional violation, but finding an insufficient record to demonstrate a prima facie case of discrimination based on sexual orientation); People v. Zuniga, No. H022931, 2002 WL 31054113, at *1–7 (Cal. Ct. App. Sept. 16, 2002) (concluding that the trial court did not err in denying a *Batson/Wheeler* motion in a homicide case in which the defendant was a gay man; the challenged strike involved a prospective juror

crimination on the basis of sexual orientation in jury selection.[288] Colorado,[289] Oregon,[290] and Minnesota[291] have passed statutory prohibitions on sexual orientation-based discrimination in jury service, although little decisional law specifically addresses the exercise of peremptory challenges under these provisions.[292] Some courts have declined to extend *Batson v. Kentucky*[293] to prohibit peremptory strikes based on sexual orientation.[294] One federal district court acknowledged California precedent barring peremptory strikes based on sexual orientation, but found no equal protection violation when a prosecutor stated expressly that he struck a juror because the venireperson was "a cross-dresser or transvestite."[295]

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who was a gay man who said that he was sensitive to bias and, in light of comments from other jurors "that were not very positive about gays, he had to keep the 'bar' high").

[288] *SmithKline Beecham Corp.*, 740 F.3d at 474. As this Article went to press, the Ninth Circuit sua sponte called for briefing on whether review en banc of the panel decision in *SmithKline Beecham* was warranted. Order Requesting "Simultaneous Briefs, SmithKline Beecham Corp. v. Abbott Labs., No. 11-17357, (9th Cir. Mar. 27, 2014), http://cdn.ca9.uscourts.gov/datastore/general/2014/03/27/11-17357_order_requesting_simultaneous_briefs.pdf, *archived at* http://perma.cc/3RTC-T8UN.

[289] COLO. REV. STAT. § 13-71-104(3)(a) (2014) ("No person shall be exempted or excluded from serving as a trial or grand juror because of race, color, religion, sex, sexual orientation, marital status, national origin, ancestry, economic status, or occupation.").

[290] OR. REV. STAT. § 10.030(1) (2013) ("Except as otherwise specifically provided by statute, the opportunity for jury service may not be denied or limited on the basis of race, religion, sex, sexual orientation, national origin, age, income, occupation or any other factor that discriminates against a cognizable group in this state.").

[291] MINN. STAT. ANN. § 593.32 (2013) ("A citizen shall not be excluded from jury service in this state on account of race, color, religion, sex, national origin, economic status, marital status, sexual orientation, or a physical or sensory disability.").

[292] *See* Shmuel Bushwick, *Excluding Gay Jurors After* Windsor, AMERICAN BAR ASSOCIATION LGBT LITIGATOR (Nov. 7, 2013), http://apps.americanbar.org/litigation/committees/lgbt/articles/fall2013-1113-excluding-gay-jurors-after-windsor.html, *archived at* http://perma.cc/AJ3J-ANK3 (noting that Colorado, Minnesota, and Oregon have statutes that prohibit sexual orientation discrimination in jury selection, but noting that "[t]he case law interpreting the intersection of these protections and *Batson* challenges remains limited"). Legislation was also recently introduced in West Virginia to ban discrimination on the basis of sexual orientation in jury service. *W. Va. House Bill Bars Excluding Gays From Juries*, W. VA. GAZETTE (Apr. 10, 2013), http://www.wvgazette.com/News/201304100180, *archived at* http://perma.cc/8HZL-RPWH.

[293] 476 U.S. 79, 89 (1986) ([T]he Equal Protection Clause forbids the prosecutor to challenge potential jurors solely on account of their race or on the assumption that black jurors as a group will be unable impartially to consider the State's case against a black defendant.").

[294] *E.g.*, United States v. Ehrmann, 421 F.3d 774, 781–82 (8th Cir. 2005) ("Although the California Supreme Court has held sexual orientation should be a protected class for jury selection purposes . . . and the Ninth Circuit has assumed, without deciding, sexual orientation qualifies as a *Batson* classification . . . neither the United States Supreme Court nor this circuit has so held. While we seriously doubt *Batson* and its progeny extend federal constitutional protection to a venire panel member's sexual orientation, our review of the trial record persuades us that even if Ehrmann made a prima facie case of purposeful discrimination, his *Batson* objection fails because the government offered legitimate, nondiscriminatory reasons for striking the panel member." (citations omitted)); United States v. Blaylock, 421 F.3d 758, 769 (8th Cir. 2005) (Ehrmann co-defendant; same).

[295] Carter v. Duncan, No. C 02-0586SBA(PR), 2005 WL 2373572, at *5, *8, *17–18 (N.D. Cal. Sept. 27, 2005) (concluding that the appellate court's rejection of the prisoner's

A panel of the Ninth Circuit recently addressed the issue in *SmithKline Beecham Corp. v. Abbott Laboratories*.[296] In that case, which involved alleged antitrust and unfair trade practices claims concerning the pricing of anti-HIV drugs, "Abbott used its first peremptory strike against the only self-identified gay member of the venire."[297] GlaxoSmithKlein (GSK) challenged Abbott Labs' (Abbott) exercise of a peremptory strike, claiming that Abbott had struck a gay prospective juror based on his sexual orientation, and that this violated equal protection under *Batson*.[298] The district court first stated that it did not know whether *Batson* applied in civil cases (it does), then questioned whether *Batson* applied to sexual orientation, and then said (incorrectly) that a *Batson* challenge could not be made without demonstrating a pattern of discriminatory strikes.[299] The district court gave Abbott an opportunity to provide a rationale for the peremptory strike.[300] Counsel for Abbott responded that he did not know the juror was gay.[301] Although the prospective juror's sexual orientation was not made express in the record, he referred during voir dire to his "partner," using male pronouns.[302] The district court denied GSK's motion.[303] After a mixed verdict, GSK cross-appealed, contending that Abbott's use of a peremptory strike on the basis of sexual orientation was unconstitutional.[304]

A panel of the Ninth Circuit concluded that the exercise of peremptory strikes based on sexual orientation violated equal protection.[305] Relying on the U.S. Supreme Court decision in *Windsor*, the court concluded that heightened scrutiny applies to classifications based on sexual orientation.[306] The Ninth Circuit then reasoned that *Batson* protections should be extended to gays and lesbians, explaining that, "[P]ermitting a strike based on sexual orientation would send the false message that gays and lesbians could not be

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claim that the peremptory strikes at issue violated equal protection was not contrary to, or an unreasonable application of, federal law because "[t]he prosecutor did not say he was challenging Lewis because of his sexual orientation, but because Lewis was a 'cross-dresser or a transvestite,'" and reasoning that, "[n]o case has yet recognized cross-dressers as a cognizable group," and that "[t]he way individuals present themselves in terms of dress, jewelry, hairstyle, and conventional or unconventional behavior may be legitimate clues as to their views and their ability to interact with others").

[296] SmithKline Beecham Corp. v. Abbott Labs., 740 F.3d 471, 474 (9th Cir. 2014); *see* Ben Adlin, *Homosexual Jurors' Rights under Review: 9th Circuit Will Consider Whether Jurors Can Be Dismissed for Being Gay*, L.A. DAILY J., Nov. 19, 2012, at 1; Adam Liptak, *Court to Decide if Lawyers Can Block Gays From Juries*, N.Y. TIMES (July 29, 2013), http://www.nytimes.com/2013/07/30/us/court-weighs-exclusion-of-jurors-because-theyre-gay.html, *archived at* http://perma.cc/XJ8W-78MV.

[297] *SmithKline Beecham Corp.*, 740 F.3d at 474.

[298] *Id.*

[299] *Id.* at 475; *id.* at 476 ("[T]he district judge applied the wrong legal standard in evaluating the *Batson* claim.").

[300] *Id.* at 475.

[301] *Id.*

[302] *Id.* at 474.

[303] *Id.*

[304] *Id.* at 475.

[305] *Id.* at 474.

[306] *Id.* at 483.

trusted to reason fairly on issues of great import to the community or the nation."[307] Stating that "*Windsor*'s reasoning reinforces the constitutional urgency of ensuring that individuals are not excluded from our most fundamental institutions because of their sexual orientation," the court explained that jury service "gives gay and lesbian individuals a means of articulating their values and a voice in resolving controversies that affect their lives as well as the lives of all others."[308]

Although a comprehensive equal protection analysis is beyond the scope of this Article, the reasoning of *Windsor* does seem to reinforce the rationale for extending *Batson* to sexual orientation and transgender status. The majority opinion authored by Justice Kennedy makes clear that due process and equal protection bar governmental differentiations affecting a "politically unpopular group"[309] that have no purpose other than to "degrade or demean"[310] that group, divest it of "duties and responsibilities,"[311] or "impose inequality"[312] and express "improper animus."[313] While *Batson* focused on purposeful discrimination based on race,[314] its predecessor case, *Swain v. Alabama*, stated that "the constitutional command forbidding intentional exclusion" from jury service was not limited to African Americans, but "applies to any identifiable group in the community which may be the subject of prejudice."[315] *Batson* was extended to bar peremptory strikes based on gender because women had suffered a history of past discrimination, and because gender-based challenges were based on "outdated misconceptions"[316] and invidious stereotypes that harm individuals and communities.[317] Peremptory strikes based on sexual orientation and transgender status should be prohibited for the same reasons. While the *Batson* framework itself can be criticized for failing to root out bias by advocates,[318] extending *Batson*'s ad-

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[307] *Id.* at 486.

[308] *Id.* at 485.

[309] United States v. Windsor, 133 S. Ct. 2675, 2693 (2013) (quoting U.S. Dep't of Agric. v. Moreno, 412 U.S. 528, 534–35 (1973) (internal quotation marks omitted)).

[310] *Id.* at 2695.

[311] *Id.*

[312] *Id.* at 2694.

[313] *Id.* at 2693.

[314] Batson v. Kentucky, 476 U.S. 79, 94–95 (1986).

[315] Swain v. Alabama, 380 U.S. 202, 204–05 (1965) (citing Hernandez v. Texas, 347 U.S. 475 (1954)). *Hernandez* barred discrimination in jury service against Texans of Mexican descent in part based on a history of discrimination in that state. 347 U.S. at 477–82. The *Hernandez* Court explained, "community prejudices are not static, and from time to time other differences from the community norm may define other groups which need the same protection." *Id.* at 478.

[316] J.E.B. v. Alabama, 511 U.S. 127, 135 (1994) (quoting Craig v. Boren, 429 U.S. 190, 198–99 (1976)) (internal quotation marks omitted).

[317] *Id.* at 130–31, 135–36, 139–40; *id.* at 140 ("The community is harmed by the State's participation in perpetuation of invidious group stereotypes and the inevitable loss of confidence in our judicial system that state-sanctioned discrimination in the courtroom engenders.").

[318] Bennett, *supra* note 248, at 161–62 ("Although *Batson* and its progeny purportedly prohibit striking members of a protected class on account of class membership

mittedly limited protections to sexual orientation and gender identity would still perform an important "expressive function."[319]

Extending *Batson*-type protections to LGBT venire members may raise some practical issues. Unlike race, a prospective juror's sexual orientation and transgender status are not listed on the jury questionnaire. In some situations, this has created threshold questions about whether a juror is a member of a protected category and whether a juror is being discriminated against because of a perception that the juror is LGBT. For example, in *Commonwealth v. Smith*, a 2008 Massachusetts case, the prosecutor attempted to challenge a juror for cause on the grounds that the juror had some "identification issues."[320] The prosecutor described the juror as a person who "seemed to be a man dressed as a woman, and [who] appeared to have breasts."[321] The defense attorney replied, "I see a man who maybe at best I would argue might be homosexual."[322] He continued, "And if the Commonwealth's intention is to challenge on the homosexuals . . . . ," implying that if this was the case the challenge for cause should be denied.[323] The trial court denied the prosecutor's challenge for cause.[324]

The Commonwealth then made a peremptory challenge to the venireperson,[325] which the defense challenged:

> DEFENSE COUNSEL: Your Honor, I'd like to put on the record that I'm beginning to see a pattern on the basis of the Commonwealth with the exclusion of a homosexual, white male. So I want to put that on the record as well.
> THE JUDGE: Okay. You've put it on the record.
> DEFENSE COUNSEL: For the Court's consideration. Thank you.
> THE PROSECUTOR: Just so I may be crystal clear, there's absolutely no pattern. I don't even know of any even [sic] homosexuals that have been before us.
>
> This particular gentleman was dressed, in my opinion, like a female and he has breasts and so forth. And, frankly, I was just looking at this from a common sense point of view.
>
> This guy has a lot of identification issues, and I don't—[326]

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alone, this limitation is easily circumvented if the prosecutor proffers a facially class-neutral justification and the defendant cannot establish purposeful discrimination to the court's satisfaction."); Anthony Page, Batson*'s Blind-Spot: Unconscious Stereotyping and the Peremptory Challenge*, 85 B.U. L. Rev. 155, 178–79 (2005).

[319] *See* Cass R. Sunstein, *On the Expressive Function of Law*, 144 U. Pa. L. Rev. 2021, 2024 (1996) (describing the expressive function of law as "the function of law in 'making statements' as opposed to controlling behavior directly").

[320] Commonwealth v. Smith, 879 N.E.2d 87, 95 (Mass. 2008) (internal quotation marks omitted).

[321] *Id.*

[322] *Id.* (internal quotation marks omitted).

[323] *Id.*

[324] *Id.*

[325] *Id.*

[326] *Id.* at 96–97 (internal quotation marks omitted).

The trial court upheld the state's peremptory challenge, explaining that, "You have a right to present a challenge. You can challenge a person for any reason, as long as it's not illegal. It's very simply put."[327]

The defendant was convicted of first-degree murder in a case that did not ostensibly involve any LGBT issues.[328] He appealed the trial court's ruling on this peremptory challenge.[329] The Massachusetts Supreme Judicial Court (SJC) acknowledged that it had not yet "considered the question whether the exercise of a peremptory challenge to remove a juror because of his or her sexual orientation or because the juror was transgendered would violate the guarantees of art. 12 [of the Massachusetts Declaration of Rights] or the equal protection clause."[330] However, the court did not decide the question because it concluded that the "record does not supply the necessary factual foundation."[331]

The SJC concluded that the record reflected "confusion" about the prospective juror's membership in a protected category.[332] It explained:

> Defense counsel appeared to object to the prosecutor's supposed use of a peremptory challenge to remove the juror on the basis of homosexuality, while the prosecutor seemed clearly to focus on what he perceived to be the transgendered appearance of the juror. None of the judge's comments offers additional insights about the juror, and thus we have no information about the juror's sex or transgendered status beyond the superficial observation that the juror appeared, at least to one person, to be a man with breasts, dressed as a woman. The juror did not identify himself as homosexual, and there was no evidence offered from any other sources on this issue.[333]

As a result of this ambiguity in the record, the court did not reach the question of whether the state's exercise of a peremptory strike violated this prospective juror's rights.[334]

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[327] *Id.* at 96.

[328] *Id.* at 90.

[329] *Id.*

[330] *Id.* at 96; *see also* Peter W. Agnes, Jr., *Peremptory Challenges in Massachusetts: Guidelines to Enable the Bench and Bar to Comply with Constitutional Requirements*, 94 MASS. L. REV. 81, 96 (2012) ("The SJC has not decided whether a peremptory challenge may be used to exclude a prospective juror on the basis of sexual orientation or status as a transgendered person.").

[331] *Smith*, 879 N.E.2d at 96.

[332] *Id.*

[333] *Id.*

[334] *Id.* at 97 ("[G]iven the factual uncertainty in this case about what, if any, discrete 'grouping' the juror might fit into, it was not error for the judge to fail to [address the issue sua sponte] . . . . The factual ambiguity surrounding the juror's sex, transgendered status, and sexual orientation, as well as the motive or reason for the prosecutor's challenge, combined with the absence of an objection from defense counsel when the challenge was made, impeded the trial judge's ability to draw an inference that purposeful discrimination had occurred."); *cf.* Sneed v. Fla. Dep't of Corrs., 496 F. App'x 20, 27

Smith illustrates the complexities of protecting queer and trans prospective jurors through traditional means in the court system.[335] While a juror's sexual orientation or transgender status in fact may be a reason that he or she suffers discrimination, it may not be manifest to observers or stated in the record.[336] For these reasons, the *Batson* framework—as well as other reform measures suggested in the context of race, such as keeping statistics[337]—may be difficult to administer in the context of LGBT venirepersons.

It is in part for this reason that some commentators call for the abolition of peremptory challenges.[338] Two U.S. Supreme Court Justices have advo-

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(11th Cir. 2012) (per curiam) (rejecting the prisoner's ineffective assistance of counsel (IAC) claim, which alleged that the attorney had failed to object to the use of peremptory challenges against gay jurors, explaining that "Sneed has presented no evidence concerning the sexual orientation of the members of the jury pool or the petit jury," and concluding that his IAC claim failed in part because "he did not demonstrate that homosexuals were underrepresented").

[335] Since *Smith* was decided in 2008, Massachusetts has passed an important anti-discrimination protection for transgender people, "An Act Relative to Gender Identity," which protects against discrimination on the basis of gender identity in employment, housing, credit, public education, and under hate crimes provisions. *See* 2011 Mass. Acts 866; Press Release, Office of the Governor, Governor Patrick Signs Transgender Equal Rights Bill (Nov. 23, 2011), *archived at* http://perma.cc/4KYD-H4DZ. Although the act does not definitively answer the questions relating to peremptory challenges presented in *Smith*, it could raise awareness and change actors' behavior. Judicial organizations have advocated for public education for members of the bar and bench, as well as court personnel. *See, e.g.*, JUDICIAL COUNCIL OF CALIFORNIA, SEXUAL ORIENTATION FAIRNESS IN THE CALIFORNIA COURTS: FINAL REPORT OF THE SEXUAL ORIENTATION FAIRNESS SUBCOMMITTEE OF THE JUDICIAL COUNCIL'S ACCESS AND FAIRNESS ADVISORY COMMITTEE 41–42 (2001), *archived at* http://perma.cc/QK95-7KK2 (making recommendations and referrals to the Center for Judicial Education and Research).

[336] *See* People v. Bell, 151 P.3d 301, 304 (Cal. 2007). A murder defendant claimed that the prosecution violated California *Batson/Wheeler* doctrine by exercising peremptory challenges based on race and sexual orientation. *Id.* at 295, 300. While the jurors' racial identities were in the record, there was no record of sexual orientation of the two prospective jurors. *Id.* at 304. The defense challenge was described as follows:

> [D]efense counsel claimed the prosecutor had exercised group bias against lesbians in peremptorily challenging Prospective Jurors [F.B.] and [L.W.]. Asked for the factual basis to believe [F.B.] was a lesbian, counsel pointed to "her physical appearance" and the fact she had participated in a gay rights march, "is involved with other feminist issues and reads women's literature." In the case of [L.W.], counsel pointed to her "non-traditional job" (as a carpenter and locksmith) and that she "reads women's issues."

Id. at 301.

[337] *See* Burke, *supra* note 243, at 1485–86 ("Another method of identifying and neutralizing bias during the peremptory challenge process would be to collect and publish both individual and office-wide data regarding the exercise of peremptory challenges.").

[338] Maisa Jean Frank, Note, *Challenging Peremptories: Suggested Reforms to the Jury Selection Process Using Minnesota as a Case Study*, 94 MINN. L. REV. 2075, 2077 (2010) (describing possible reforms of peremptory challenges, including barring the use of peremptories on the basis of an expanded category of protected groups, and eliminating peremptory challenges entirely); Kathryne M. Young, *Outing* Batson*: How the Case of Gay Jurors Reveals the Shortcomings of Modern Voir Dire*, 48 WILLAMETTE L. REV. 243, 245–46 (2011) (recognizing challenges to applying *Batson* doctrine to gay identity, and suggesting instead the elimination or reduction in number of peremptory challenges). *But see* Jeffrey Bellin & Junichi P. Semitsu, *Widening* Batson*'s Net to Ensnare More than*

cated this solution in the context of race-based challenges, largely because the *Batson* framework has proven so difficult to police.[339] However, eliminating peremptory challenges could be a double-edged sword because, as discussed in Part II.A., under prevailing tests for challenges for cause, litigants sometimes are forced to remove "explicit-but-fair" homonegative jurors through peremptory challenges.[340]

In *SmithKline Beecham Corp.*, the Ninth Circuit was careful to note that "prudent courtroom procedure" can overcome any administrative challenges (in addition to concerns about privacy) created by extending *Batson* to lesbians and gays.[341] To support its conclusion that administrative problems can be overcome, the court pointed to the California state court system's "successful application of *Wheeler* [California state constitutional *Batson* equivalent] protections"[342] to discrimination on the basis of sexual orientation for the past for thirteen years.[343]

Codes of judicial conduct and attorney ethics rules also prohibit manifestations of bias on the basis of factors including sexual orientation.[344] Such provisions prohibit attorneys from describing prospective jurors in pejorative ways and require trial judges to take steps to prohibit biased comments and

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the Unapologetically Bigoted or Painfully Unimaginative Attorney, 96 CORNELL L. REV. 1075, 1120–29 (2011) (proposing a revised *Batson* framework that does not require a finding of purposeful discrimination and cataloguing purportedly race-neutral explanations attorneys have proffered for peremptory challenges).

[339] Miller-El v. Dretke, 545 U.S. 231, 273 (2005) (Breyer, J., concurring) ("I believe it necessary to reconsider *Batson*'s test and the peremptory challenge system as a whole."); Batson v. Kentucky, 476 U.S. 79, 102–03, 107 (1986) (Marshall, J., concurring) ("The inherent potential of peremptory challenges to distort the jury process by permitting the exclusion of jurors on racial grounds should ideally lead the Court to ban them entirely from the criminal justice system."); *see also* Liptak, *supra* note 296 (discussing Justices Marshall and Breyer's views on peremptory challenges).

[340] *See supra* Part II.A.

[341] SmithKline Beecham Corp. v. Abbott Labs., 740 F.3d 471, 487 (9th Cir. 2014).

[342] *See* People v. Wheeler, 583 P.2d 748, 761–62 (Cal. 1978).

[343] *SmithKline Beecham Corp.*, 740 F.3d at 487.

[344] *See*, *e.g.*, MODEL CODE OF JUDICIAL CONDUCT R. 2.3(B) (2011) ("A judge shall not, in the performance of judicial duties, by words or conduct manifest bias or prejudice, or engage in harassment, including but not limited to bias, prejudice, or harassment based upon race, sex, gender, religion, national origin, ethnicity, disability, age, sexual orientation, marital status, socioeconomic status, or political affiliation, and shall not permit court staff, court officials, or others subject to the judge's direction and control to do so."); MODEL RULES OF PROF'L CONDUCT R. 8.4(d) cmt. 3 (2013) ("A lawyer who, in the course of representing a client, knowingly manifests by words or conduct, bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status violates [this rule] when such actions are prejudicial to the administration of justice."). *See generally* Jennifer Gerarda Brown, *Adjudication According to Codes of Judicial Conduct*, 11 AM. U. J. GENDER SOC. POL'Y & L. 67 (2002) (discussing applicable provisions of the Code of Judicial Conduct); Jennifer Gerarda Brown, *Sweeping Reform from Small Rules? Anti-Bias Canons as a Substitute for Heightened Scrutiny*, 85 MINN. L. REV. 363 (2000) (arguing that the Model Code of Judicial Conduct could provide some protection for gays and lesbians in the absence of heightened scrutiny under the equal protection clause).

behavior.[345] However, the comment on Rule 8.4 of the Model Rules of Professional Conduct states that even a finding that an attorney exercised a peremptory challenge on a discriminatory basis will not necessarily mean that he or she has run afoul of this rule.[346]

As long as our system utilizes peremptory challenges, advocates should not be permitted to exercise them based on a juror's actual *or perceived* sexual orientation or transgender status.[347] Such a rule would address the type of situation presented in *Smith*, where the prosecutor stated expressly that he was striking the juror because of what he perceived as the venireperson's "identification issues."[348] It should not matter whether the prospective juror identifies as a transgender woman or a gay man; it is unacceptable for the state to strike a juror because the prosecutor reads the venireperson as gender non-conforming or transgender.

Conclusion

The U.S. Supreme Court's June 2013 decisions in *Hollingsworth* and *Windsor* marked a watershed moment for the LGBT rights movement. At times during the spring of 2013, it seemed that every few days an additional state[349] or country[350] recognized same-sex marriage, or another politician announced her support of marriage equality.[351] The issues discussed in this pa-

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[345] Model Code of Judicial Conduct R. 2.3(C) (2011) ("A judge shall require lawyers in proceedings before the court to refrain from manifesting bias or prejudice, or engaging in harassment, based upon attributes including but not limited to race, sex, gender, religion, national origin, ethnicity, disability, age, sexual orientation, marital status, socioeconomic status, or political affiliation, against parties, witnesses, lawyers, or others.").

[346] Model Rules of Prof'l Conduct R. 8.4(d) cmt. 3 (2013) ("A trial judge's finding that peremptory challenges were exercised on a discriminatory basis does not alone establish a violation of this rule.").

[347] Anti-discrimination statutes sometimes are written this way for just this reason. *See*, *e.g.*, Conn. Gen. Stat. § 46a-81a (2013) ("For the purposes of [certain sexual orientation discrimination statutes], 'sexual orientation' means having a preference for heterosexuality, homosexuality or bisexuality, having a history of such preference or *being identified with such preference* . . . ." (emphasis added)); Mass. Gen. Laws ch. 151B, § 3(6) (2012) (protecting individuals from discrimination based on sexual orientation including discrimination based on "being identified as" straight, gay, or bisexual).

[348] Commonwealth v. Smith, 879 N.E.2d 87, 95–96 (Mass. 2008).

[349] Davey, *supra* note 221; Erik Eckholm, *Delaware, Continuing a Trend, Becomes the 11th State to Allow Same-Sex Unions*, N.Y. Times (May 7, 2013), http://www.nytimes.com/2013/05/08/us/delaware-to-allow-same-sex-marriage.html, *archived at* http://perma.cc/L7VB-SQAR; Dorothy J. Samuels, Op-Ed., *And Then There Were Ten,* N.Y. Times, Apr. 28, 2013, at SR10, *archived at* http://perma.cc/N7FP-XWZ5 (reporting that Rhode Island had become the tenth state to approve same-sex marriage).

[350] Cassandra Vinograd, *Britain Legalizes Gay Marriage*, Yahoo News (July 17, 2013), http://news.yahoo.com/britain-legalizes-gay-marriage-133757426.html, *archived at* http://perma.cc/G5MY-4F9T.

[351] *See, e.g.*, Sheryl Gay Stolberg, *Hillary Clinton Endorses Same-Sex Marriage,* N.Y. Times (Mar. 18, 2013), http://thecaucus.blogs.nytimes.com/2013/03/18/hillary-clinton-endorses-same-sex-marriage/, *archived at* http://perma.cc/7WQP-ZA5F.

per are in flux, reflecting not only shifting legal regimes, but also rapidly changing social attitudes.[352]

Many of the points made in this piece are about managing that change. More cases involving LGBT issues and sexuality will enter the courts in coming decades. Lawyers and courts will have to adjust to this reality and develop effective voir dire techniques. Multiple interrelated and conflicting issues may surface, including the need to protect the rights and dignity of LGBT prospective jurors while also identifying anti-LGBT bias. Determining the best response to these challenges will require a highly contextual and localized approach.

While much is in transition, this much is certain: jury voir dire is a unique context in which to observe contested cultural norms, and a particularly intriguing window on public attitudes during a time of rapid social change. Since Paul Lynd wrote his article fifteen years ago,[353] it truly does appear that a "sea change" in attitudes toward LGBT issues has occurred.[354] I hope that this Article will help attorneys and courts navigate voir dire on this shifting terrain.

[352] *See* Nagourney, *supra* note 26.

[353] Lynd, *supra* note 3.

[354] *See Windsor* Transcript of Oral Argument, *supra* note 217, at 105–06 (argument exchange between attorney Roberta Kaplan and Justice Scalia); Harwood, *supra* note 128 (reporting "sea change" in attitudes toward LGBT issues in just fifty years).